SMALL BUSINESS LEGISLATIVE COUNCIL

SBLC REPORT

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DOMINOES ANYBODY?

As previously reported, the Administration has decided to delay the imposition of penalties on large employers that fail to provide or fail to provide affordable health care insurance coverage to employees.

Does the decision open up the possibility of changes to the reform law? In our estimation, "yes it does." From our viewpoint, what it did was accelerate the timetable. We have felt for a long time that 2015 was going to be the year of reckoning. In 2015, individuals would be filing their first tax returns (for 2014) that would require the payment of penalties for failing to have health insurance. And millions of individuals would be realizing for the first time what the rhetoric of health care reform means in real dollars. We also felt the insurance companies would be back in Washington in 2015 looking for adjustments as they come to grips with the new premium rating limitations.

Until the Administration blinked, those Democrats who recognized that some of the concerns about the law were legitimate were willing to toe the line in order to hold the implementation process together. But, when the staunchest advocate, the President, gives in on a major issue, those Democrats begin to think it is okay to think about tinkering. Couple that with the natural tendency for legislators to take an administrative relief and turn it into firm statutory relief (just to make sure it sticks), and you have a recipe for legislative action, even bi-partisan legislative action.

We do not see how the individual mandate can be enforced in light of the delay decision. If you work for a large employer that previously had not provided coverage, you probably thought odds are, you will not have exposure for a penalty in 2014, and now you do. If the Administration tries to be sympathetic to those employees, how do they write a rule that carves them out but not employees of small businesses that choose not to provide coverage? But we do not think it will drill down to that level of logic. We think the push will remain where Speaker John Boehner (R-OH) has already framed it (our paraphrasing): "C'mon, you are going to let large employers off the hook, but not individuals? No way."

(Ironically, a repeal of the individual mandate probably increases the odds the insurance industry will be asking for help. Their ability to remain viable in light of the premium rating limitations (e.g. guaranteed coverage, limited rating bans) of health care reform hinges on the influx of the young and healthy into the system.)

If one wants to think smaller solutions in addition to mandate delays, the next logical point of compromise is on the 30-hour rule for determining full time employment status. It certainly is the source of most angst for low-wage industries. Some unions have also expressed concern about the impact of the rule on the traditional 40-hour week. As a result, a revision has bipartisan written all over it. (Unions and some employers using multiemployer plans have other issues on which that they will now press harder, now that the "we can talk about changes" dam has been breached.)

If one wants to hit some even lower profile items, one could do a lot to ease the burden of reporting requirements related to the monthly monitoring of the status of employees as to coverage. For smaller businesses not caught in the employer mandate regime, we would sure like a fix for the nondiscrimination rule of which we have written many times that is a mandate in disguise for small employers that do provide coverage.

The House will consider bills next week. One is the Fairness for American Families Act, H.R. 2668, introduced by Representative Todd Young (R-IN), which would provide a one-year delay in the imposition of the individual health insurance mandate penalties. Another is the Authority for Mandate Delay Act, H.R. 2667, introduced by Representative Tim Griffin (R-AZ), which would delay the application of the employer health insurance mandate for one year. We expected them to pass on party line votes but it will be interesting to see if any Democrats join the majority.

The Senate is not likely to consider those bills "as is" (at least initially.) The question is whether the Senate can be persuaded (think the Form 1099 scenario when the waves of pressure kept building) to take action. The first stage of activity will probably take the form of amendments to other legislative vehicles. We will probably see riders attached to various appropriations bills but given the low probability for passage of appropriations bill this year (not much different from previous years ☺) those are not likely candidates for success. Proponents will look for a solid logical legislative vehicle in the Senate as an amendment platform. The temperature of the Senate will be taken on those votes. Our guess is that by October it will be hot enough.

INVESTORS WANTED

Since its enactment, we have not spent too much energy on the Jumpstart Our Business Startups Act (JOBS Act). The headline provision was one that permitted "crowdfunding" and the law included a number of other technical revisions to "loosen" up the rules for attracting investors. Not many of our readers are in a position to take advantage of the changes in law. But, in the glass half full spirit of things, we will note that the Securities and Exchange Commission (SEC), has issued a final rule implementing one section of the JOBS Act, which lifts the ban on general solicitation and general advertising. According to the Office of Advocacy for Small Business, "the SEC rule permits startups, venture capitalists, and hedge funds to openly advertise to raise money in private offerings provided that the issuer of securities takes 'reasonable steps' to verify that the purchasers of the securities are accredited investors. The SEC's rule includes a non-exclusive list of methods that an issuer may use to verify that a purchaser is an accredited investor. Find it at http://www.sec.gov/rules/final/2013/33-9415.pdf"

ON THE MOVE

A bill, H.R. 2542, introduced by Representative Spencer Bachus (R-AL), to expand the scope of the Regulatory Flexibility Act, in on the move in the House. It is in committee now. Among other things, it would require agencies to consider the indirect impact of proposed rules on small businesses, not just the direct effects.