SMALL BUSINESS LEGISLATIVE COUNCIL

SBLC WEEKLY

January 28, 2013 Volume XIV Issue 04

COMMISSION SALES FORCE AND HEALTH CARE REFORM

If you are unlikely to ever have 50 or more employees, skip this story. No reason to torture yourself.

In the December 31, 2012 Weekly, we provided an extensive analysis of the Department of Treasury/Internal Revenue Service's (IRS) proposed rule covering the process for determining whether a business is a large employer for the purposes of the health care reform law, the Patient Protection and Affordable Care Act (PPACA). The proposed regulations also cover the processes for determining whether a large employer might be liable for the two potential penalties for: 1) not offering adequate coverage to all full time employees (and their dependents), or 2) offering coverage and having an employee obtain coverage from an exchange anyway.

A copy of the proposed rules can be found at http://www.irs.gov/pub/newsroom/reg-138006-12.pdf.

To determine whether one is a large employer one has to determine how many full time employees an employer has as well as full time equivalents. Then, in order to calculate the potential penalties you have to know whether a specific individual was a full time employee at that time.

I do not want to rehash the entire process but one important part of the exercise is to calculate an employee's "hours of service." Hours of service include not only hours when work is performed but also hours for which an employee is paid or entitled to payment even when no work is performed. The proposed rule provides a standard for workers paid on an hourly basis and three methods for calculating the hours of service for non-hourly employees. (described in the December 31st Weekly)

Employees who are paid on a commission basis (and potentially independent contractors that might be characterized as employees for PPACA purposes (a subject I also commented on in the December 31st Weekly)) fall within the non-hourly category and thus an employer must use one of the three methods provided for them.

As employers have looked at the proposed rule, the initial reaction is that it is not clear how to use the methods to determine how many hours of service commission basis sales persons who do not work onsite actually have.

Indeed, the Treasury and the IRS conceded the point in the proposed rule. They said, "The Treasury Department and the IRS are continuing to consider, and invite further comment on, how best to determine the full-time status of employees in the circumstances [such as commission sales activity]. Further guidance to address potentially common challenges arising in determining hours of service for certain categories of employees may be provided in the final regulations, or through Revenue Procedures, or other forms of subregulatory guidance. Until further guidance is issued, employers of employees in [commission sales positions] must use a reasonable method for crediting hours of service that is consistent with the purposes of the health care reform law. A method of crediting hours would not be reasonable if it took into account only some of an employee's hours of service with the effect of recharacterizing, as non-fulltime, an employee in a position that traditionally involves more than 30 hours of service per week. For example, it would not be a reasonable method of crediting hours to fail to take into account travel time for a travelling salesperson compensated on a commission basis."

In my book, that does not add up to a whole lot of comfort. We will press the IRS for better guidance. If you have a good suggestion, we are all ears.

SELF-INSURED PLANS

While I am on the topic of health care reform, it is a good time to point out that while much of PPACA applies to self-insured employer plans, there are some differences.

Among the differences: A self-insured plan does not have to provide minimum essential benefits; is not subject to the medical loss ratio requirement; and, is subject to a different (and arguably less onerous) nondiscrimination penalty, if highly compensated employees receive different benefits. The self-insured plans must pay a fee known as the new fee, the Patient-Centered Outcomes Research Fee.

If you are self-insured, you probably have already consulted with your advisor about the differences but this is a just-in-case reminder.

CONGRESSIONAL OUTLOOK

The revisions to the filibuster rule do not appear to be anything to get excited about. At the end of the day, the 60 vote rule remains in place, and from the business community's perspective, that is a good thing. If the election had come out differently, I would probably be saying it was not a good thing.

On the other hand, the appeals court ruling rejecting the Administration's expansive interpretation of a "recess" for the purposes of making temporary appointments without Senate confirmation, will have some impact.

Personally, I think the objections to nominations and the efforts to keep Congress in session to prevent recess appointments have gone overboard. A President, whether I agree with that President's philosophy or not, should get the benefit of the doubt on ideology, when it comes to filling positions within the Administration. Judicial appointments are a different matter.

RECONCILIATION

Before the election, I observed there was a remote possibility that a budget process device known as reconciliation might provide a way to repeal or revise the health care reform law. Well, given the fact it needed the Republicans to control the Senate, that is not going to happen, but I am going to dust off the primer anyway. There is some hallway chatter about using reconciliation for tax reform purposes.

The only reason it is worth mentioning because the most recent effort to postpone dealing with the fact we as a nation have reached our borrowing limit includes a requirement that the Senate pass a budget resolution. Without that, the reconciliation scenario is not possible.

Much of the following is taken from the public domain explanation at http://infousa.state.gov/economy/econ_finance.html#bud, a government website. (Except for my editorially spins☺)

Budget Resolution

While the President has an obligation to present a proposed budget, there is no obligation for the Congress to consider it.

The budget process really starts with the adoption (or failure to, particularly when the chambers of Congress are held by different parties) of a concurrent budget resolution by Congress.

This resolution must ultimately pass both the House and the Senate in identical form, but does not require signature by the President. The budget resolution covers the upcoming fiscal year and at least five ensuing fiscal years. The budget resolution may include reconciliation instructions.

The important fact about the budget resolution is that in the Senate it is not subject to a filibuster.

Reconciliation

The reconciliation process begins with the inclusion of reconciliation instructions in the budget resolution. These instructions require authorizing committees with jurisdiction over mandatory spending and revenue policies (usually more than one) to make legislative changes in those programs to effect a specified level of budgetary savings provisions.

Once the relevant authorizing committees have reported their legislation to the Budget Committees, it is the Budget Committees' responsibility to combine those bills into an omnibus package (or packages) as specified by the budget resolution.

In the Senate, total debate on a reconciliation bill is limited to 20 hours, although the actual time for consideration of the omnibus package often exceeds this time limit set in the Budget Act. The reconciliation bill is not subject to a filibuster. (This is what makes it a vehicle for tax reform.)

Motions and amendments may be offered and considered without debate at the end of this time period. There are also restrictions on the content of a reconciliation package and on the amendments which may be offered to it. For example, any amendment to the bill that is not germane, would add extraneous material, would cause deficit levels to increase, or that contains recommendations with respect to the Social Security program, is not in order and there is also the "Byrd Rule."

Byrd Rule

Under the Byrd rule, the Senate is prohibited from considering extraneous matter as part of a reconciliation bill or resolution or conference report thereon. The definition of what constitutes "extraneous matter" is set forth in the Budget Act; however, the term remains subject to considerable interpretation by the presiding officer (who relies on the Senate Parliamentarian). The Byrd rule is enforced when a Senator raises a point of order during consideration of a reconciliation bill or conference report. If the point of order is sustained, the offending title, provision or amendment is deemed stricken unless its proponent can muster a 3/5 (60) Senate majority vote to waive the rule.

The Congressional Budget Act sets forth six tests for matters to be considered extraneous under the Byrd rule. The criteria apply to provisions that:

*do not produce a change in outlays or revenues;

* produce changes in outlays or revenue which are merely incidental to the non-budgetary components of the provision;

*are outside the jurisdiction of the committee that submitted the title or provision for inclusion in the reconciliation measure;

*increase outlays or decrease revenue if the provision's title, as a whole, fails to achieve the Senate reporting committee's reconciliation instructions;

*increase net outlays or decrease revenue during a fiscal year after the years covered by the reconciliation bill unless the provision's title, as a whole, remains budget neutral;

*contain recommendations regarding the OASDI (social security) trust funds.

The Congressional Budget Act allows certain otherwise covered Senate-originated provisions to be excepted from the Byrd rule if the provisions are certified for exemption by the Senate Budget Committee chair and ranking minority member, as well as the chair and ranking minority member of the committee of jurisdiction. The permitted exceptions are:

*a provision that mitigates direct effects attributable to a second provision which changes outlays or revenue when the provisions together produce a net reduction in outlays;

*the provision will result in a substantial reduction in outlays or a substantial increase in revenues during fiscal years after the fiscal years covered by the reconciliation bill;

*the provision will likely reduce outlays or increase revenues based on actions that are not currently projected by CBO for scorekeeping purposes; or

*such provision will likely produce significant reduction in outlays or increase in revenues, but due to insufficient data such reduction or increase cannot be reliably estimated.

The Byrd rule is not self-enforcing. A point of order must be raised at the appropriate time to enforce it. The Byrd rule can only be waived by a 3/5 (60) majority vote of the Senate.