Employment and Benefits Law Alert: Developments of the First 100 Days, Part Two

March 14, 2017

Since the days of former President Franklin D. Roosevelt, the United States has closely tracked a new president's first 100 days in office. Here at Gray Plant Mooty, our employment, labor, and benefits law teams have been monitoring and will continue to track activity by the Trump administration in the employment and benefits law area. This alert is the second in a series of updates to our employer clients on key developments during those first 100 days. To access the first alert in our series, click here.

LGBTQ Restroom Access Rights

Over the last several years, legal battles have been ongoing at the federal level as to whether Title VII's prohibitions on sex discrimination extend to LGBTQ status and, if so, whether workplace restroom access must be based on gender identity or can be lawfully restricted based on anatomy. Under the Obama administration, the Equal Employment Opportunity Commission (EEOC) staked out the position that Title VII prohibits LGBTQ discrimination and requires workplace restroom access based on gender identity. The EEOC's position, however, does carry the force of law. Accordingly, employment lawyers and human resources professionals were eagerly awaiting more legal clarity from the U.S. Supreme Court in a student restroom access case that it had accepted for review, *Gloucester County School Board v. G.G.* Last week, however, the Supreme Court reversed course and sent the *Gloucester* case back to the lower appellate court without Supreme Court review.

The *Gloucester* case involves the question of whether a Virginia high school must grant a trans-male student bathroom access based on his gender identity rather than his anatomy. The case involves Title IX of the Education Amendments Act of 1972, not Title VII, but was likely to have a persuasive impact on Title VII law. While Title VII prohibits sex discrimination in employment, Title IX prohibits sex discrimination in education. In reviewing Title IX cases, federal courts often look to and are persuaded by Title VII cases and the reverse is also true.

When the *Gloucester* case was accepted for review by the Supreme Court, one of the legal questions up for review was whether a 2016 U.S. Department of Education (DOE) guidance document stating that Title IX prohibits transgender discrimination and requires restroom access based on gender identity was entitled to judicial deference. This guidance was issued under the Obama administration, but, under the Trump

administration, was recently withdrawn. As a result, the Supreme Court remanded the *Gloucester* case back to the lower appellate court for further consideration.

To date, the EEOC has not issued any formal change in its position that Title VII encompasses and prohibits LGBTQ discrimination, although such a change could be forthcoming. GPM will be continuing to monitor developments in this area in order to provide updates. In the meantime, employers will need to continue watching the legal developments in lower federal courts with jurisdiction over their areas of operation to determine federal law compliance obligations. In addition, employers need to be mindful of state law requirements. Currently, a minority of states, including Minnesota, include transgender status as a protected class under state employment discrimination laws. While certain religious employers may be exempt from federal or state LGBTQ discrimination laws, employers should consult legal counsel to determine their potential obligations.

Employee Benefits

Since our first 100 Days alert, the Trump administration has continued to move forward on its promises to repeal and replace the Affordable Care Act (ACA) and to revisit the U.S. Department of Labor's (DOL's) fiduciary rule. As to what employers need to do so far, it continues to be "Hurry up and Wait!"

The ACA (aka Obamacare)

Last week, with White House support, House Republicans proposed the "American Health Care Act" (AHCA) to repeal and replace the ACA. The AHCA plan has already been approved by the Ways and Means and the Energy and Commerce Committees of the House of Representatives. Nonetheless, there is plenty of opposition — both inside and outside of the Republican Party. And that was even before the Congressional Budget Office estimated, in a report issued on March 13, that the AHCA would cause 14 million people to lose coverage in the first year (2018).

Some of the basics of the proposed AHCA plan are getting a lot of press: The individual and employer mandates of the ACA would both go away in favor of an increased premium for those who don't maintain coverage. The premium and cost sharing subsidies of the ACA would give way to tax credits for those buying individual policies. Health savings accounts would be encouraged. Medicaid expansion would be gradually rolled back, and federal Medicaid funds would be calculated as a per capita allotment. Medicare taxes on high earners would be reduced.

What does all this mean for employers, though, and will the AHCA become law? We can't pretend to have all of the answers yet, but here are the items we're keeping an eye on for employers:

What Would Stay The Same?

- Many ACA benefit design aspects would not change if the AHCA becomes law. For example, the following would continue: the prohibition on lifetime and annual dollar limits; required coverage of preventive care without cost sharing; the prohibition on pre-existing condition exclusions; coverage for children to age 26; external review requirements; SBC requirement; and wellness incentives.

What Might Change For Employer Plans?

- If the AHCA is adopted, ACA penalties on employers would be retroactively eliminated effective January 1, 2016. Large employers that have been designing their plans to comply with the employer mandate could stop tracking employee work hours and determining eligibility under ACA regulations. For those eager to throw the Form 1095-C into the recycle bin, however, don't move too fast—the reporting requirement would not go away under the AHCA. There's been some talk about the IRS potentially providing relief from reporting. However, we noticed that individuals purchasing their own insurance would only get tax credits if they are not eligible for coverage through an employer plan. As such, some level of employer reporting may still be needed.

- Tax credits could be used by individuals who get unsubsidized COBRA premiums. Employers would need to certify that the COBRA coverage is eligible for the credit. This could result in greater take-up of COBRA coverage offers.

- Tax credits could not be used to pay for any plan that covers abortion. Employers who have plans covering abortion would need to decide whether to continue covering it. If they do, their COBRA beneficiaries would not be able to take advantage of tax credits.

- The 21st Century Cures Act gave small employers the ability to establish a health reimbursement arrangement (HRA) that could help employees to purchase individual insurance. This law was passed by Congress to override rules the IRS had issued about HRAs, and it is generally viewed as a positive for small employers that want to help employees but don't want to offer a group health plan.

- For employers offering high-deductible health plans, new rules for HSAs would allow employers and employees to contribute more—almost double what they can contribute now—to their HSA. Spouses could make catch-up contributions to the same HSA. The tax penalty for withdrawing HSA money to spend on something other than health care would be reduced from 20 percent to 10 percent. All of this would likely serve to encourage participation in high-deductible health plans and HSAs.

- Tax credits for low-wage small employers would be repealed as of January 1, 2020. Small employers taking advantage of this may need to reconsider offering group coverage to employees.

- The additional 0.9 percent Medicare payroll tax for high earners would be repealed after December 31, 2017.

- The Cadillac tax would be suspended until 2025. We had heard the Cadillac tax would be replaced by a cap on the deduction for employer-provided coverage. Instead, there's another delay. The Cadillac tax has few defenders, but does provide some much-needed revenue, at least for budget projections.

- The $2,600 limit on health Flexible Spending Accounts would be removed. Employers could allow employees to make much larger pre-tax contributions to these accounts.

What Should Employers Do Now?

- For now, employers still just need to "hurry up and wait." Passage of the AHCA is not yet certain. If the proposed AHCA does pass, it might first be subject to significant changes.
- Stay on top of COBRA notices—this is likely to be more important in an uncertain health insurance environment.

Fiduciary Rule

The fiduciary rule mostly impacts financial institutions and investment advisors, but employers have been hearing a lot about the rule and its potential effects on their plans. The Trump administration has proposed a 60-day delay in implementing the fiduciary rule, for the purpose of examining, at President Trump's direction, whether the fiduciary rule will adversely affect people's access to retirement information and financial advice. The fiduciary rule was to become effective on April 10, 2017. If adopted, the proposed delay will push back the implementation date to June 9, 2017.

The proposed 60-day delay was published by the DOL in the *Federal Register* on March 2, and a 15-day period for comments was announced. Since then, comments have apparently been flooding in to the DOL. The DOL will need to review the comments, decide on a final rule, and issue that rule with responses to the comments—all before the fiduciary rule is officially delayed. For now, everyone anticipates that the proposed delay will be implemented, and that the delay period will be used to make significant changes to the fiduciary rule or to repeal it altogether.

Nevertheless, there has been some angst about what to do while the fiduciary rule is still technically set to become effective in less than one month. The DOL alleviated some of this angst by announcing a temporary enforcement policy last Friday: If the proposed 60-day delay is not decided on and published by April 10, the DOL will not take enforcement action in any gap period between April 10 and the date the final rule regarding the delay is published. If a decision is made not to delay the fiduciary rule's implementation, the DOL won't initiate enforcement immediately if advisors and financial institutions provide required disclosures within a reasonable period of the publication of that decision.

Questions

If you have questions about your employment or benefits law needs, please contact a member of the firm's employment law, labor law, or employee benefits teams.