NOVEMBER 2009

HEALTH CARE REFORM: HOUSE BILL WOULD MAKE IT NEARLY IMPOSSIBLE TO REDUCE RETIREE MEDICAL BENEFITS

The version of health care reform passed by the House of Representatives on November 7, 2009, the "Affordable Health Care for America Act" ("H.R. 3962" or the "House Bill"), contains, among its myriad rules and requirements, a provision that would have a dramatic effect on many employers. Section 110 of H.R. 3962 limits the ability of a group health plan sponsor to reduce retiree medical benefits. As currently drafted, Section 110 would not become effective until enactment. The fate of this provision remains uncertain, of course, as the Senate has not approved a health care reform bill, and the provision is not in either of the bills currently under consideration in the Senate. Employers who are contemplating changes to their retiree medical benefits should consider acting quickly—before the potential new restrictions may become effective.

NEW SECTION 717 OF ERISA

Section 110 would add a new section 717 to the Employee Retirement Income Security Act of 1974 ("ERISA"). As proposed, this new section has three notable aspects: (i) it would prohibit virtually all reductions in retiree medical benefits, (ii) it would be effective upon enactment, and (iii) only a limited possibility of an "undue hardship" waiver from the Department of Labor (the "DOL") would be available to avoid the prohibition.

Prohibition on Reductions of Retiree Medical Benefits. The proposed prohibition on reduction of retiree medical benefits would be expansive. New section 717(a) of ERISA would require every group health plan to have a provision that "expressly" bars such plan (and any fiduciary thereof) from reducing benefits provided under the plan to any retiree (or beneficiary thereof) if the reduction affects the benefits provided

as of the date of the participant's retirement—*unless* the reduction is also made with respect to active participants under the group health plan. The statutory prohibition would also override any plan provision that (i) reserves a general power to amend or terminate the plan, or (ii) specifically authorizes the plan to make post-retirement reductions in retiree medical benefits.

A "5 percent rule" would measure whether any reduction in retiree medical benefits would be covered by the prohibition. Proposed ERISA section 717(c) indicates that a "reduction in benefits" for purposes of the statute would occur where: (i) a participant's (or beneficiary's) share of the total premium (or for self-insured plans, costs of coverage) for the plan increases by more than 5 percent, or (ii) for other cost-sharing and benefits, the actuarial value of the benefit package decreases by more than 5 percent.

Effective upon Enactment. The new statute would be effective on the date the bill is enacted into law. This is unlike the effective-date timing for most of the other parts of the House Bill (and in both of the two health care reform proposals currently pending in the Senate), in that there would be no delay or gradual "phase in" of the new rule over a period of years.

Possibility of Waiver for "Undue Hardship." The bill creates the possibility that an employer could apply to the Secretary of Labor for a waiver from the above-described requirements, if the employer can "reasonably demonstrate" that the requirements would impose an "undue hardship" on the employer. It is unclear, however, what would constitute such an undue hardship, as the provision does not describe what kinds of conditions or circumstances would qualify. It does not seem likely that the DOL would be generous in granting undue-hardship waivers.

ADDITIONAL CONSIDERATIONS

In light of the potentially imminent effective date of the proposed provision, a plan sponsor considering making changes to its retiree medical benefits (or that would consider making such changes if it had only one last chance to do so) may now have only a short time frame within which to make changes.[1] Indeed, the American Benefits Council and the AFL-CIO, in a joint letter made public the week of November 9, criticized the proposed provision, arguing that, as written, it could well create a stampede by employers to dump retiree medical benefits altogether before the new restrictions could become law.[2]

Before rushing to make changes to retiree medical plans, several caveats ought to be considered:

Basic Considerations. First, because the legislative process for this bill is still ongoing, the effective date of the provision could be revised to make it effective retroactively, rendering any immediate attempt to change retiree medical benefits moot. Second, a plan sponsor contemplating making any such retiree medical changes would also need to consider whether the changes could be made consistent with both the terms of the plan itself and with other applicable law, which varies considerably from one federal judicial circuit to another. Third, if the retiree medical arrangement is subject to or part of a collective bargaining agreement, a plan sponsor would need to consider whether or not making such a change would be foreclosed by the terms of the collective bargaining agreement.

---

1 Unlike other proposals that have previously been made in Congress, Section 110 of H.R. 3962 would not appear to apply to reductions in retiree benefits made before the enactment of the new ERISA section 717 or require the restoration of previously reduced retiree benefits. *Cf.* Pension Protection Act ERISA Amendments of 2008, H.R. 6143, 110th Cong. § 105 (2008) (proposing to add a new Section 803 to ERISA, which would have allowed retirees to elect to "restore" their retiree medical benefits to an amount, level, type, etc., at which such benefits were offered at least a year before enactment); *Key Legislator's Bill Bars Reduction in Retiree Health Benefits, Offers PPA Changes*, GRIST REPORT (Mercer, Wash., D.C.), May 30, 2008, at 1.

2 *See* Letter from Diann Howland, Vice President of Legislative Affairs, American Benefits Council and William Samuel, Director of the Department of Legislation, AFL-CIO, to Nancy Pelosi, Speaker, U.S. House of Representatives (Nov. 2, 2009) (on file with author), available at http://news.bna.com/pdln/PDLNWB/split_display.adp?fedfid=15714369&vname=pbdnotallissues&wsn=498939500&searchid=9618899&doctypeid=1&type=date&mode=doc&split=0&scm=PDLNWB&pg=0.

Multiple Plans. Some employers with group medical plans have entirely separate plans for retirees (often with separate VEBAs). Because there is no language in the proposed ERISA Section 717 that would aggregate the group health plans of a single employer for purposes of applying the requirements of the provision, it is not clear how the provision would be construed in the case of a retiree-only group health plan.

Regulatory and Other Developments. Further amendments could be made to clarify ambiguities in the proposed statute, and the DOL may adopt clarifying regulations. It is likely that any such new regulatory authority would be expansive.

Consultation with Counsel. Because retiree medical benefit arrangements have been the subject of much litigation, a decision to modify such plans should involve consultation with counsel, to take into account all relevant considerations to minimize the risks of liability. Careful consideration should be given to: (i) the class of individuals potentially affected by the modifications, (ii) a fact-intensive survey and analysis of whether such modifications are permissible under relevant historical plan documents and collective bargaining agreements, (iii) any other written or oral communications with retirees regarding their benefits, and (iv) most importantly, the federal judicial circuit in which any potential, ensuing litigation would likely be conducted.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Marlene P. Frank
+1.614.281.3843
mpfrank@jonesday.com

Daniel C. Hagen
+1.216.586.7159
dchagen@jonesday.com

Elena Kaplan
+1.404.581.8653
ekaplan@jonesday.com

Sarah B. McClure
+1.202.879.3811
sbmcclure@jonesday.com

Evan Miller
+1.202.879.3840
emiller@jonesday.com

Steven J. Sacher
+1.202.879.5402
sjsacher@jonesday.com

Gary G. Short
+1.214.969.5238
ggshort@jonesday.com

J. Quitman Stephens
+1.214.969.4841
jqstephens@jonesday.com