NAIFA GovTalk

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March 2020

Congress Scrambles to Address Coronavirus Fear/Economic Impact

After enacting into law an $8.3 billion public health emergency funding measure, lawmakers and the President shifted their focus on how to help reeling industries, small businesses, and workers impacted by the spreading disease.

On March 13, the House passed 363 to 40 the "Families First Coronavirus Response Act" that contains paid sick leave provisions. There are three important elements to these provisions:

- ***Emergency paid leave***: All employers will have to provide 14 days of paid sick leave to employees who contract COVID-19, who are isolated or seeking medical care due to exposure to it, and/or who are having to stay away from work to take care of children whose schools and/or daycare have closed due to the emergency.
- ***FMLA paid leave***: This provision is still open to question. But most Family and Medical Leave (FMLA) experts think the language in the bill as passed by the House requires small employers (those with 500 or fewer employees) to pay for sick leave (after the first 14 days, which are covered by the emergency paid leave provisions) taken by employees under the FMLA. Affected employers will have to pay 2/3 of the worker's average monthly pay while the workers are on FMLA leave.
- ***Tax credits for employers***: Employers who actually pay for sick leave under these new rules will be entitled to a tax credit. The tax credit is $511/person, up to an annual cap of $7,156, for paid sick leave under the emergency paid leave rules. It is $200/person, up to an annual cap of $10,000, for the FMLA rules.

The bill contains many other provisions as well—including free coronavirus testing, increased Medicare/Medicaid funding, provisions to help medical care providers, expanded unemployment insurance program benefits, expanded food/nutrition program benefits, and more. The bill, H.R.6201, is in effect for one year from the date of enactment.

Prospects: The Senate is planning to vote on the measure this week. As of Friday, the bill was widely expected to pass, and President Trump was urging lawmakers to vote for it. However, opposition to the structure of the paid sick leave rule could slow the process.

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Tax Writers Mull Legislation to Help Businesses Hit Hard by Coronavirus

Tax writers in the House, Senate, and Administration are mulling what is sometimes being called an "airlines tax bill" as a way to help businesses struggling in the midst of the coronavirus crisis. While any such bill will likely focus on specific industries, there is potential for provisions that could impact NAIFA members and/or their clients. Particularly worrisome is a nonqualified deferred compensation (NQDC) proposal.

Currently, tax writers are focused on three areas:

- Provisions to jump-start the economy, which is stalling due to fears that are keeping consumers from spending and thus hurting businesses—these "economic stimulus" proposals could be targeted to businesses particularly susceptible to harm from the coronavirus outbreak—e.g., small businesses
- Targeted industry relief, such as waivers of specific taxes payable by airlines and other transportation companies
- Provisions to funnel money directly to consumers, perhaps by a (probably temporary) cut in payroll taxes paid by individuals, businesses or both—a payroll tax cut was proposed by President Trump on March 9

So far, there has been little discussion of the potential cost of such a tax bill, and no discussion about offsetting those costs. However, some proposals come with very high price tags (e.g., a proposal to give each U.S. adult citizen a $1,000 check, with a $500 check for each child, at a one-year cost of an estimated $350 billion). Discussion of offsets is inevitable, even if Congress ultimately chooses simply to add the cost to the already-burgeoning federal deficit/debt.

One potential offset could be a proposal to accelerate tax liability on nonqualified deferred compensation (NQDC). Sen. Bernie Sanders (I-VT)—one of two front-running candidates for the Democratic nomination for President—last month released a proposal to tax NQDC at the time it vests rather than when it is actually paid. His proposal, while broader, is very similar to an NQDC proposal offered by the GOP when it was fashioning the legislation that became the Tax Cuts and Jobs Act (TCJA), the tax reform law enacted in 2017. The Sanders proposal was introduced as S.3341 on February 27. It was co-sponsored by Sens. Chris Van Hollen (D-MD) and Kirsten Gillibrand (D-NY).

Prospects: The Sanders NQDC proposal is getting a close look by lawmakers and their technical staffs, and it could find its way—likely modified and narrowed—into the "airlines tax bill" mix. But, while it has sparked interest among both Senate and House tax writers from both parties, it was widely viewed as a non-starter issue for 2020—until the coronavirus crisis triggered wide-ranging Congressional reactions. Most tax writes believe the proposal is overbroad—they are concerned about its impact on middle-management (thanks to the effective lobbying by NAIFA against the similar proposal during the run-up to the TCJA). However, with a history of at least some support by Republicans, this proposal puts some NAIFA interests at risk, at least until and unless Congress decides not to write a tax bill in response to the coronavirus threat, or decides to write such a bill, but not to offset it.

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Work Continues on Second-Generation Retirement Savings Bills

Both House and Senate tax and pension law writers are working on legislation to follow up on the SECURE Act that was enacted into law late last year. In addition to new proposals, this second-generation legislation (nicknamed "SECURE 2.0") could expand/fix some of the new rules contained in the SECURE Act that is now the law.

There are three specific areas of focus, as this second-generation retirement savings bill develops. They include:

- New provisions—including a proposal to require employers with more than ten full-time employees to offer (if they don't already have a qualifying plan in place), a retirement savings plan with a payroll deduct feature, and an auto-enrollment feature to their employees. This proposal would not require the employer to contribute on behalf of its workers; however, it would require the employer to establish a plan and automatically enroll its workers (subject to their ability to opt-out), at a 6% of salary contribution level (and escalating). If an employer wishes to take advantage of the safe harbors (employer matching) available to avoid nondiscrimination testing, then employers would be required to contribute on behalf of their employees. Another potential proposal is patterned on the old "USA" savings plan," a plan that would allow limited (probably $2,500 to $5,000/year) in after-tax contributions to a savings plan, with tax-free growth and tax-free distributions, for basically any purpose.

- The Senate's "Portman-Cardin" bill—legislation that "builds on SECURE" crafted by Sens. Rob Portman (R-OH) and Ben Cardin (D-MD). This bill includes new provisions like allowing employers to count student loan payments made by the employer on behalf of their workers as retirement plan contributions. In essence, this allows employers to match to the retirement plan an amount paid by the employee in student loan repayment.

- "Fixes"/Modifications to SECURE: Also, in the mix are proposals to clarify and/or expand SECURE provisions that have already been enacted into law. These include overturning SECURE's ban on financial institutions (including insurers and broker-dealers) from sponsoring multiple employer plans (MEPs) and expanding the new tax credit for establishing a retirement plan to include employers who participate in MEPs (or "pooled plans," as the SECURE law calls them). Also, on the table is a proposal to expand eligibility to participate in MEPs to nonprofits, public education organizations, religious institutions, and others who currently offer 403(b) rather than 401(k) plans to their employees.

Technical staff for both the tax-writing and pension law writing committees, in both the House and Senate, are currently meeting with stakeholders and negotiating among themselves in an effort to move second-generation retirement savings legislation later this year. The target date for a bill is "before August recess," although that target date could definitely slip.

Prospects: This is a bipartisan effort—but it is one without any "real" deadlines, so as election-year

politics continue to heat up (and if lawmakers remain focused on legislation to respond to the coronavirus crisis), the effort could falter.

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Comparison of Surprise Billing Proposals

Resolution of the surprise billing issue remains a Congressional/Administration priority. Here is a comparison of the three major proposals currently being negotiated by lawmakers seeking to craft a consensus proposal that can be enacted into law by late May.

The three leading proposals are:

- **H.R.5800**, a bill approved by the House Education & Labor (E&L) Committee on February 11
- **H.R.5826**, a bill approved by the House Ways & Means (W&M) Committee on February 12
- **The HELP/E&C bill**, an as-yet unintroduced measure agreed to by Senate Health, Education, Labor and Pensions (HELP) Chairman Sen. Lamar Alexander (R-TN) and the leaders of the House Energy & Commerce (E&C) Committee (chairman Rep. Frank Pallone (D-NJ) and ranking member Rep. Greg Walden (R-OR))

All three measures are bipartisan. All have considerable similarities—including one big one: all of them would shield patients (individuals) from "surprise bills" (i.e., out-of-network (usually much higher) charges for ancillary treatments during surgery or emergency medical care). All three proposals would cap bills to patients at in-network amounts.

Also, alike in the three bills is the use of an "independent dispute resolution" (IDR) mechanism to determine how much payers (insurers, self-insured plans) pay out-of-network providers. The details of how those IDRs are set up differ, with the key difference being whether and when a "benchmark rate" would be used.

Generally, payers (insurers and employers) prefer the E&L and/or HELP/E&C approaches, which include as a starting point use of a benchmark rate (based on the average or median cost of the services in question in similar geographic areas). These bills would allow IDR for disputes in excess of $750, and in cases that do go to an IDR, the IDR would be required to consider the average rates in that geographical area.

The Ways & Means bill requires IDRs to consider average rates in the area (but may not use "usual and customary" rates) for all disputes—there is no threshold below which the benchmark rate would apply. This is the approach supported by payers. Medical care providers, however, want an IDR mechanism that does not include a benchmark rate. They say benchmark rates are tantamount to price controls and would significantly undercut patients' access to the (usually) specialized care that is usually the subject of surprise bills.

All three bills save both the government and insureds money—the Congressional Budget Office estimates that the W&M bill would reduce insurance premiums by between 0.5 percent and one percent per year and would lower the federal deficit by $17.8 billion between 2021 and 2030. The other two bills could save as much as $24 billion over ten years, Congressional staffers say. The savings are targeted to be used to fund expiring community care programs, something which needs to be done by May 22. Thus, May 22 is viewed as a kind of deadline for completing work on the surprise billing legislation.

Prospects: There is a good chance that some kind of surprise billing legislation—that includes an IDR component and a ban on balance billing to patients—will be enacted this year, possibly by May. However, the coronavirus crisis and its impact on Congressional priorities (and Congress' operation itself) could cause a delay. NAIFA will keep you posted on progress on this issue.

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IRS Issues Proposed Regulation on Deductibility of Meals Provided with Nondeductible Entertainment

The Internal Revenue Service (IRS) has proposed a new regulation that lays out rules for when the cost of meals provided in connection with entertainment is deductible, even though the entertainment expense is not. The Tax Cuts and Jobs Act (TCJA), the tax reform law enacted in late 2017, eliminated the deduction for business entertainment expenses, but it did not eliminate the deduction for business meals.

As proposed, the regulation would allow the cost of meals provided in connection with business entertainment to be deductible (it's a 50-percent deduction) so long as the cost of the meal is shown on a separate receipt (or otherwise clearly separated from the cost of the entertainment). The proposed regulation also makes clear that to be, the taxpayer must be present at the meal; the meal cannot be "extravagant under the circumstances," and business must be discussed at the meal. The proposed regulation specifies that the cost of the entertainment venue, even if the venue is providing the meal, is not deductible.

Prospects: Washington insiders anticipate that this proposed regulation will be finalized, probably with few, if any changes, relatively quickly. Comments on it are due within 45 days of the proposed regulation's publication in the Federal Register (so, mid-April). The IRS also plans to hold a hearing on the proposed regulation on April 7.

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ACA Health Insurance Commissions on the Rise

On February 25, an official from the Department of Health and Human Services (HHS) Center for Consumer Information and Insurance Oversight (CCIIO) told a group of health insurance advisors that commissions for selling Affordable Care Act (ACA) health insurance are on the rise.

Commissions were "one of the first things that went away" under the ACA, said Randy Pate, CCIIO's director. "We are starting to see those come back." Pate attributed the resurgence in health insurance

commissions paid for Obamacare coverage to, at least in part, more insurers entering the ACA marketplaces, and increases in competition. Pate said 69 percent of agents and brokers reported receiving commissions for the ACA enrollees they worked with during the 2020 open enrollment period. CCIIO surveyed health insurance advisors and found that 27 percent of the respondents said their commissions from their individual market enrollments are up. Some 25 percent said their commissions were down, and 48 percent said their commissions were about the same. Pate said that this “is not something we can directly regulate, but we can try to create the environment where commissions can come back.”

Prospects: The courts are currently considering whether the ACA is constitutional after Congress zeroed out the penalties the ACA imposed on individuals for failure to carry qualified health insurance. And the Trump Administration is on record in favor of eliminating the ACA (although not all its provisions—e.g., the ban on the use of preexisting conditions and the rule that allows parents to ensure their adult children up to age 26) and replacing it with what they say would be a better more patient and market-centered approach. However, while Obamacare remains in place, it is a positive development for health insurance advisors that the Administration recognizes the value they add to the process of purchasing health insurance through an Obamacare exchange. NAIFA has been working with the Administration to achieve this result..

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SEC Finalizes Variable Annuity Summary Prospectus Rule

On March 11, the Securities and Exchange Commission (SEC) officially adopted its long-awaited rule that will create a summary prospectus for variable annuity and variable life insurance contracts. The new rule, which was proposed by the commission over a year ago, would make disclosures on these products easier to understand by simplifying and streamlining prospectuses. This is good news for investors in these products, as the simpler prospectus formats may lead to better consumers' understanding of these products and the benefits they provide.

The new rule permits the Securities Act’s prospectus delivery obligations for variable products to be satisfied, providing a summary prospectus to investors and making the statutory prospectus available online. The new summary prospectus framework leverages both technology and a layered disclosure approach to improve the ability of investors to understand and evaluate variable contracts.

New Option to Use a Summary Prospectus for Variable Contracts

New rule 498A under the Securities Act permits the use of two distinct types of contract summary prospectuses:

- initial summary prospectuses covering variable contracts currently offered to new investors; and
- updating summary prospectuses for existing investors.

The initial summary prospectus includes: a table summarizing certain key information about the contract's fees, risks, and other important considerations; an overview of the contract; and more detailed disclosures relating to fees, purchases, withdrawals, and other contract benefits. The updating summary prospectus includes a brief description of certain changes to the contract that occurred during the previous year, as well as the key information table from the initial summary prospectus.

In certain types of variable contracts, investors allocate their investment to one or more underlying investment options (typically, mutual funds). Both the initial summary prospectus and the updating summary prospectus provide certain key information about those underlying investment options.

Availability of Variable Contract Statutory Prospectus and Other Materials

The new rule requires that the variable contract's statutory prospectus, as well as the contract's Statement of Additional Information (SAI), be publicly accessible, free of charge, at a website address specified on, or hyperlinked in, the cover of the summary prospectus. An investor who receives a contract summary prospectus will be able to request the contract's statutory prospectus, and SAI be sent in paper or electronically, at no cost to the investor.

Optional Method to Satisfy Prospectus Delivery Requirements for Underlying Mutual Funds

The new rule permits variable contracts to make the prospectuses for underlying mutual fund investment options, and other documents relating to those mutual funds, available online. The variable contract's summary prospectus must provide certain key information about those mutual funds. Investors will be able to request and receive these mutual funds' prospectuses (and the other related documents that are available online) in paper or electronically, at no cost.

Updates to Variable Contract Registration Forms

The amendments to Forms N-3, N-4, and N-6—the registration forms for variable contracts— are designed to update and enhance the disclosure regime for those investment products. These amendments are intended to improve the content, format, and presentation of information to investors, including by updating the required disclosures to reflect industry developments (e.g., the prevalence of optional insurance benefits in today's variable contracts). In addition, the Commission adopted amendments to require the use of the Inline eXtensible Business Reporting Language (Inline XBRL) format for the submission of certain required disclosures in the variable contract statutory prospectus.

Discontinued Variable Contracts

The issuers of some variable contracts that are discontinued by July 1, 2020, will not have to update the variable contracts' registration statements or provide updated prospectuses to existing investors. The Commission is taking the position that this would not provide a basis for enforcement action under specified conditions, including that investors are provided with certain alternative disclosures, as described in the adopting release. In taking this position, certain staff no-action letters relating to discontinued contracts providing alternative disclosures will be withdrawn.

Other Amendments

Finally, the Commission adopted certain technical and conforming amendments to its rules that reflect the new framework for variable contract summary prospectuses. The Commission also adopted other amendments and the rescission of certain rules and forms that were rendered moot by legislative actions or are otherwise no longer necessary.

The new rule and related rule and form amendments will become effective on July 1, 2020.

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NAIFA Adjusts to COVID-19

NAIFA and our members have not escaped the disruption to daily life and business the COVID-19 outbreak has caused across the United States and the world. NAIFA's top concern is protecting the health and safety of our members and staff as well as the American public.

While NAIFA continues to monitor and adjust to the pandemic environment, several actions have been implemented:

- Protecting members and staff - NAIFA instituted a mandatory telework policy and has equipped staff to continue providing quality member service.
- Ensuring the financial viability of your association – NAIFA urged the National Economic Council at the White House to include tax-exempt organizations in any federal policies to support businesses impacted by the coronavirus.
- Serving Main Street consumers – NAIFA continues to work with the National Business Emergency Operations Center (NBEOC), FEMA's virtual clearinghouse for two-way information sharing between public and private sector stakeholders to help people before, during, and after disasters.

NAIFA will remain nimble in this rapidly changing environment and will keep you abreast of changes. Please watch your email or visit https://advocacy.naifa.org/covid-19 for our latest COVID-19 resources and, of course, contact NAIFA directly if you have any questions. Wash your hands and stay healthy.