CONGRESS CONTEMPLATES "COMP TIME" BILL

In May 2017, the House of Representatives passed the Working Families Flexibility Act, which would amend the Fair Labor Standards Act to allow nonexempt employees in the private sector to choose to receive compensatory time ("comp time") in lieu of overtime pay for hours worked in excess of 40 hours per week. Under current law, employers in the public sector must pay nonexempt employees a rate of at least one and one-half of their regular wage for each overtime hour worked. However, certain government employees can receive comp time in lieu of overtime pay.

The Working Families Flexibility Act would allow private sector employees who had worked at least 1,000 hours in a 12-month period to accrue up to 160 hours of compensatory time per year, at the rate of one and one-half hours of comp time for each overtime hour worked, which could be used upon reasonable notice by the employee as long as such use does not disrupt the employer's operations. The decision of whether to receive overtime pay or comp time would be up to the individual employee or a collective bargaining agreement covering a group of employees, and any compensatory time accrued by the employee but unused by the end of the year would need to be paid to the employee. Additionally, any employee could, with 30 days' notice, choose to cash out their unused comp time and return to traditional payment of overtime. Similarly, employers could, with 30 days' notice, discontinue offering comp time as an alternative option to overtime pay. The bill states that employers may not intimidate, threaten, or coerce employees to choose to take comp time instead of overtime pay or force them to use accrued comp time. If enacted, this provision is one of the most likely to lead to litigation between employees and employers.

The bill is currently pending before the Senate, which may not have enough support to pass the bill. Proponents of the law believe that the bill would add flexibility for workers, while opponents believe that it would undermine the payment of overtime. Similar bills have been proposed in Congress previously, including as recently as 2013. However, the current bill has the support of the Trump administration. We will keep you updated on any further developments and, if passed, on techniques for implementation.

IT'S (ALMOST) JUNE 9! ARE YOU READY TO COMPLY WITH THE FINAL FIDUCIARY RULE?

At 11:59 p.m. on Friday, June 9, 2017 (the Effective Date), the ERISA definition of a fiduciary will expand to include, for the first time, many financial firms and advisors that provide investment advice to certain employer-sponsored retirement plans and individual retirement accounts (IRAs). This is because part of the final Department of Labor (DOL) Fiduciary Rule (described in our prior post) takes effect at this time, and will apply to anyone receiving a fee for providing a “recommendation” regarding covered investment transactions. “Recommendation” is broadly defined to include communications that are likely to be considered a suggestion to take, or to refrain from taking, a particular course of action.

After the Effective Date, ERISA fiduciary duties will also extend to the provision of a recommendation regarding whether or not to take a rollover or distribution from an ERISA retirement plan or an IRA, even if the rollover or distribution recommendation is not accompanied by investment advice.

While the Fiduciary Rule most directly impacts investment advice providers, employer sponsors of ERISA retirement plans should also be aware of the new rules and of the ways in which plan service provider arrangements and internal human resources practices may be impacted by them.

Key requirements and recommendations for both investment advisors and employer retirement plan sponsors are briefly summarized, below.

Action Items for Advisors

Unless an exception or exemption applies, financial advisors who give investment advice to participants of covered plans and IRAs must now observe impartial conduct standards, and some portions of the DOL Best Interest Contract (BIC) exemption or Principal Transaction exemption (if applicable). This means that advisors must, as of the Effective Date:

- provide advice in participants’ best interests;
- receive no more than reasonable compensation; and
- avoid misleading statements.

By January 1, 2018, the remainder of the BIC and Principal Transaction exemption rules apply and affected advisors must:

- maintain (and adhere to) written anti-conflict policies and procedures;
- make required disclosures to advice recipients; and
- enter into enforceable written contracts relating to the provision of investment advice services relating to covered employer retirement plans and IRAs.

Advisor Transition-Period

Under a temporary non-enforcement policy issued by the DOL on May 22, 2017, neither the

DOL nor the IRS will enforce potential violations of the prohibited transaction rules, provided that the advisors are working diligently and in good faith to comply with the new rules. This temporary non-enforcement policy will end on January 1, 2018, which is also when the remaining parts of the Fiduciary Rule (and exemption) requirements take effect.

Taxes and Penalties for Violation

After January 1, 2018, an advice fiduciary that fails to comply with the new rules, and thereby engages in a prohibited transaction, may be required to refund all fees earned from the transaction and to pay an annual excise tax of 15% on such fees until repayment occurs. To the extent that such a prohibited transaction relates to an ERISA-subject retirement plan, a violation of the rules could potentially also result in legal claims by retirement plan sponsors or IRA investors, civil penalties, and personal liability for losses or improper profits.

Certain Assets Unaffected

The new rules do *not* affect any health, disability, term life, or other health-related arrangements or assets that do not contain an investment component. Personal brokerage accounts (not involving an employer-sponsored retirement plan or any IRA) are also unaffected by the changes.

Action Items for Employer Plan Sponsors

Employer retirement plan sponsors should consider taking the following steps:

- Review existing educational materials provided to participants to determine whether they remain non-fiduciary “investment education,” or whether they now constitute fiduciary “investment advice.”
- Review practices relating to rollovers into and out of the plan to determine whether they trigger fiduciary advice-related obligations.
- Confirm that in-house employees who provide advice to participants (if any) are not being separately compensated for such advice.
- Review contractual arrangements with advisers to determine which advisers are fiduciaries under the new rules. For those service provider serving as a fiduciary for the first time under the Fiduciary Rule, expect that agreements will be amended or replaced before January 1, 2018. Any resulting fee changes must be clearly disclosed.
- Expect to receive additional disclosures beginning in 2018 from investment advice fiduciaries that will rely on the BIC exemption to continue receiving certain types of compensation. Among other things, these disclosures must describe any of the advice fiduciary’s conflicts of interest, and the types of compensation paid in connection with plan investment recommendations.
- Carefully review all fee disclosures you receive to ensure that you understand what fees are being charged for plan services. Confirm that the fee structure and amounts of compensation received by advisers are reasonable, in light of the services performed.

EEOC WELLNESS LAWSUIT AGAINST WISCONSIN EMPLOYER ENDS IN $100,000 SETTLEMENT

A Wisconsin employer's settlement last month with the EEOC ended the final round of litigation initiated against it by the EEOC over its workplace wellness plan.

In 2009, Manitowoc-based Orion Energy Systems (Orion) implemented a wellness program that included a health assessment. The health assessment consisted of a personal health questionnaire, a biometric screening, and a blood draw. An Orion employee refused to participate and, as a result, was required to pay her full health premium costs of more than $400 per month. (Meanwhile, for employees who participated in the health assessment, the employer paid 100% of the premium cost). The employee openly questioned the purpose of the health assessment, the confidentiality of its results, and the CEO's response to her questions. Approximately three weeks after declining to participate in the health assessment, her employment was terminated. She then filed a complaint with the EEOC, which in turn sued Orion in August 2014, alleging that the company's wellness program violated the ADA as "involuntary" and that the company had retaliated against her in violation of the ADA.

The ADA generally prohibits employers with 15 or more employees from requiring medical examinations or making disability-related inquiries of an employee, unless the examination or inquiry is job-related and consistent with business necessity. The law includes an exception for "voluntary" wellness programs, but the EEOC had not finalized its definition of a "voluntary" wellness program until May 2016, nearly seven years after the events at issue in this case.

In a mixed September 2016 decision, the court for the Eastern District of Wisconsin ruled against the EEOC by finding that the wellness plan was voluntary. The court determined that the health assessment incentive (the premium cost) was permitted within the framework of a "voluntary" plan, and therefore was *not* prohibited under the general ADA medical examination and inquiry rules. While shifting even 100% of the premium cost to the employee was a strong incentive, it was still not an involuntary "compulsion," the court reasoned, because employees could still choose between completing the health assessment or paying the full premium.

While the court's ruling essentially approved the design of the wellness plan, it declined to dismiss the employee's ADA retaliation and interference claims. In other words, it was only the termination (allegedly in response to the employee's refusal to participate in the wellness plan) that the court found troubling.

To resolve these remaining issues, Orion agreed to pay the former employee $100,000. Orion also agreed:

- Not to maintain any wellness program in the future with disability-related inquiries or medical examinations that do not meet the criteria for "voluntary" wellness plans as defined under the May 2016 final EEOC regulations;
- Not to engage in any form of retaliation, including interference or threats, against any employee for raising objections or concerns as to whether the wellness program complies with the ADA;
- To tell its employees that any concerns about its wellness program should be sent to its human resources department;
- To train its management and employees on the law against retaliation and interference under the ADA; and
- To conduct an additional training meeting with its chief executive officer, its chief operating officer, its chief financial officer, its HR director, and all employees responsible for negotiating or obtaining health coverage or selecting a wellness program. This training is to include an explanation of the settlement terms and the ADA's requirements regarding wellness programs.

While Orion, in the consent decree, "continues to deny the EEOC allegations," the settlement serves as a reminder to employers not to base any employment decisions on participation or non-participation in a workplace benefit program. Wellness programs must comply not only with multiple provisions of the ADA, but also with HIPAA, the Genetic Information Nondiscrimination Act (GINA), the Affordable Care Act, and other laws. As these rules, and relevant case law, continue to evolve, it is important that employers maintaining, implementing, or considering updating a wellness plan proceed with an awareness of the potential costs of noncompliance.

DON'T OVERLOOK LIFE-INSURANCE CONVERSION NOTICE OBLIGATIONS

Employer, Not Insurer, Found Liable for Payment of Life Insurance Benefit

A court ruling earlier this month highlights the importance for employers of reviewing internal policies and procedures regarding the communication of post-employment life insurance rights. In *Erwood v. WellStar Health Systems*, a federal judge in Pennsylvania ruled that an employer owes more than $750,000 to the widow of a deceased former employee.

In this case, an employee terminated employment at the end of his FMLA period and died of a terminal illness just over nine months later. Although the former employee and his spouse believed he would continue to be covered under a life insurance policy following the end of his employment, the group policy coverage lapsed and was not continued because the company's benefits representative did not properly explain the post-employment individual policy conversion right.

Although the availability of a conversion right was mentioned in a summary plan description, the court found that the employer did not satisfy its disclosure obligations to the employee because no specific form, deadline, or other essential information about the conversion right was ever mentioned or provided, even when the employee and his spouse had reached out with questions and attended an in-person meeting. Instead, the representative simply provided multiple assurances during the employee's FMLA leave period that all benefit coverages would "remain the same."

The court held that the failure to provide the employee with specific conversion right election information amounted to a breach of the fiduciary obligation imposed by ERISA to convey complete and accurate information material to the beneficiary's circumstances. The court also found that an ERISA fiduciary may not, in the performance of its duties, materially mislead those to whom the duties of loyalty and prudence are owed. That duty not only includes the affirmative duty to inform, but also the duty to inform when the fiduciary knows that silence might be harmful to the beneficiary. The court found that the employer had breached these fiduciary obligations in its failure to provide the required conversion notice, and, as a result, found that such breaches amounted to a material misrepresentation by the employer resulting in harm to the spouse as beneficiary.

Unfortunately, the company's benefit representative was unaware of the company's communication and fiduciary obligations to provide notice to the employee of the conversion right and wrongly assumed that such notice would be provided by the life insurance carrier itself. Because the deceased employee and his spouse had relied on the company's communications to their detriment, the judge used the equitable remedy provisions of ERISA to award the widow the full amount of the life insurance benefit, $750,000 (plus interest), she would have received under the policy, had the life insurance benefit continued from the date on which employment ended.

Compare and Contrast with COBRA

Most employers are quite familiar with the obligation to provide a notice of COBRA or state continuation coverage to group health plan participants who cease to be eligible for the workplace group health insurance plan. The process of providing continuation coverage notices has become routine, and indeed, is often handled by the plan's group health insurance carrier.

However, the opposite is true of group life insurance policies. Not only are some employers less aware that group life insurance coverage applies only to active employees, the contractual language of group policies typically requires the employer (rather than the insurer) to provide the conversion right notices when employment ends.

The court's decision in *Erwood* highlights the importance of periodically reviewing internal post-employment benefits right notice obligations and of understanding who exactly has those obligations. This is particularly important in light of the fact that employers may change carriers over time, and that the details of conversion notice requirements may vary from carrier to carrier.

When the same insurer provides both long-term disability and life insurance, it may be that the insurer will be aware of an employee terminating employment on account of disability. In such case, it is possible that an insurer will be willing to assist in making sure that an employee receives a life-insurance conversion notice. It is more common, however, that the onus for providing notice of conversion rights rests solely on the employer, and not the carrier. The *Erwood* decision makes that reality clear for employers.

Because beneficiaries often become aware that eligibility or conversion information was inaccurate or incomplete (or that premiums have lapsed) only after the plan participant has passed away, life insurance errors of this kind are prime candidates for the application of an (often expensive) equitable remedy under ERISA that makes the beneficiary whole.

DON'T FORGET ABOUT DOL'S NEW OVERTIME RULES JUST YET

In November, a federal court in Texas issued a nationwide injunction blocking the U.S. Department of Labor (DOL) from implementing its updated overtime regulations, which would have required, among other things, that exempt employees be paid a minimum salary of $913 per week. Because of the injunction, the new overtime regulations did not go into effect on December 1, 2016, as planned. However, they have also not completely gone away, and their fate is still uncertain.

The Obama administration immediately appealed the injunction to the Fifth Circuit Court of Appeals and asked for an expedited proceeding, which was granted. The DOL filed its initial brief on December 15, 2016, and the twenty-one states, which had opposed the implementation of the new overtime regulations and were granted the injunction, filed their brief on January 17, 2017. DOL's final reply brief was originally due January 31, 2017. However, since President Trump was inaugurated on January 20, 2017, the Trump administration has asked for three extensions to file its reply brief, all of which have been granted. The first two extension were requested so that the new administration could consider its position on the new regulations and whether it would continue to defend them. Most recently, on Wednesday, April 19, 2017, the Fifth Circuit granted the DOL another two months, until June 30, 2017, to file its brief due to the fact that Alexander Acosta, the nominee for Labor Secretary, has not yet been confirmed.

It is not yet clear what stance the Trump administration will take on the overtime regulations, as there has been no official position taken by the President and nominee Acosta did not take a definitive position during his confirmation hearings. However, even if the administration decides not to pursue the appeal, others may. For example, the AFL-CIO's Texas branch has petitioned to join the litigation as a defendant due to its concerns that the current administration will not adequately defend the prior administration's regulations, and the national AFL-CIO has threatened to sue the DOL if it tries to scale back the regulations in any way. Additionally, the lower court, which issued the initial temporary injunction, could still issue a permanent injunction or rule on a pending motion for summary judgment, as it declined to halt proceedings while the Fifth Circuit reviewed the injunction. Therefore, these overtime regulations should still be on employers' radar, and we will keep you updated on further developments.

QSEHRAS ALLOW SMALL EMPLOYERS TO REIMBURSE EMPLOYEES' PERSONAL HEALTH COSTS

Although the Affordable Care Act's (ACA's) market reforms eliminated the ability of employers to permissibly reimburse employees for individually-incurred health insurance or medical costs, recent legislation now affords certain small employers with an alternate reimbursement option. The 21st Century Cures Act amended the Internal Revenue Code to authorize the creation of a new stand-alone HRA vehicle known as a Qualified Small Employer Health Reimbursement Arrangement (QSEHRA).

An employer may elect to implement a QSEHRA if the business offers *no* group health plan *and* is exempt from the ACA's Employer Shared Responsibility provisions by virtue of having had fewer than 50 full-time (including full-time equivalent) employees in the prior year. The 50-employee limit applies to the aggregate number of employees across all commonly-controlled or affiliated businesses.

A QSEHRA is not a “health plan” within the meaning of the ACA, but may be used to pay for or reimburse the costs of medical care and health insurance premiums incurred on behalf of an eligible employee or the employee’s family members. The employee must provide proof of the expenses or coverage costs and the IRS may later request written substantiation. Reimbursements in a calendar year may range up to $4,950 (for payments relating to only the employee) or up to $10,000 (for family coverage costs). These amounts will be adjusted for inflation, and must be prorated for partial years.

Only an employer may fund a QSEHRA. Funds paid into the QSEHRA must be in addition to salary and not paid as a salary substitute. Accordingly, salary reduction contributions by employees are not permitted. With some exceptions, the reimbursement must be made available “on the same terms to all eligible employees” of the employer. Employees who have been employed by the QSEHRA sponsor for less than 90 days, or who work part time, are part of a collective bargaining unit, or are under age 25 may be excluded from participation.

The rules require an employer to furnish a written notice to its QSEHRA-eligible employees at least 90 days before the beginning of a year for which the QSEHRA is provided. In the case of an employee who is hired mid-year, the notice must be provided no later than the date on which the employee begins participation in the QSEHRA.

The notice must include the amount of the eligible employee’s permitted benefit under the QSEHRA and advise the employee to inform any health care Exchange of such benefit amount if the employee is applying for advance payment of the premium assistance tax credit.

Under an initial transition rule, the first-applicable QSEHRA notice deadline was March 13, 2017. In Notice 2017-20, however, the Treasury Department and IRS suspended the notice deadline and waived any penalties that could have been imposed on employers for failure to provide the first written notice. Future guidance will specify a revised notice deadline, and will provide at least 90-days’ additional time for employers to prepare and provide the notice.

While QSEHRA benefits must be reported (but not treated as taxable) on the employee’s W-2 and Form 1095-B, its benefits are exempt from COBRA, or similar, continuation coverage requirements.

Ultimately, whether or not implementation of a QSEHRA makes sense for a small employer will depend on the business’s specific personnel-related objectives and goals. For some employers, the cost and administrative requirements may outweigh the potential advantages, while for others a QSEHRA will present the best possible avenue to provide employees with assistance toward paying for health care.

EMPLOYMENT LAWSCENE ALERT: WHAT PRESIDENT TRUMP'S SUPREME COURT NOMINEE COULD MEAN FOR EMPLOYERS

On January 31, 2017, President Donald Trump nominated Judge Neil Gorsuch of the Tenth Circuit Court of Appeals to fill the vacant seat on the U.S. Supreme Court left open by the death of Justice Antonin Scalia in early 2015. Many employers are wondering what impact a potential Justice Gorsuch would have on employment law decisions, and the news is generally positive. Judge Gorsuch, during his time on the Tenth Circuit, has issued decisions that have gone in favor of both employers and employees. However, he favors a straight forward application of facts to the law to reach conclusions and has been critical of administrative agencies overstepping their authority.

Judge Gorsuch, in line with holdings from the Seventh Circuit, has been critical of the *McDonnell Douglas* burden shifting framework that is frequently used in employment discrimination cases. Judge Gorsuch favors focusing on the real question – whether discrimination actually took place – instead of focusing on whether a *prima facie* case can be established. This straight-forward approach to the facts will likely be welcomed by employers who want to avoid getting bogged down in technicalities.

As we have covered multiple times, in recent years, administrative agencies such as the EEOC, OSHA, and particularly the NLRB have expanded the scope and reach of the employment laws they oversee by broadly interpreting existing laws, often to the confusion and detriment of employers. This expansion could be significantly curbed by a U.S. Supreme Court conservative majority anchored by Judge Gorsuch. In particular, Judge Gorsuch has issued opinions limiting the judicial deference that should be given to administrative agencies and stating that lawmaking should be left to Congress. For example, in his dissent in *Trans Am Trucking Inc. v. Administrative Review Board, U.S. Department of Labor,* Judge Gorsuch penned a dissent that stated that nothing in the Surface Transportation Assistance Act stated that an employee could operate a vehicle in a way the employer forbid and that the DOL did not have the authority to expand the law to say so. He also opined in a case involving the NLRB that the agency did not provide a persuasive explanation to reverse its long-standing precedent that interim earnings should be deducted from back pay awards and, therefore, should not be allowed to change its policy.

Finally, Judge Gorsuch has issued opinions favorable to arbitration agreements, which is of particular interest to employers as the Supreme Court has agreed to hear cases regarding whether the NLRB is correct in its interpretation that arbitration agreements that bar workers from pursuing class actions are illegal restraints of employees' Section 7 rights. If confirmed, Judge Gorsuch may be able to weigh-in on this important issue as the U.S. Supreme Court, yesterday, indicated that it will not address this issue during the Court's current term, but will address it next term. Hopefully, by that time Judge Gorsuch will be confirmed by the U.S. Senate. As a result, then Justice Gorsuch could be the deciding vote on this important issue.

Although Judge Gorsuch's confirmation process is likely to be long and contentious, a Justice Gorsuch anchored U.S. Supreme Court can be something that employers can look forward to in providing common sense to employment laws.

EMPLOYMENT LAWSCENE ALERT: EXECUTIVE ORDER HALTS IMPLEMENTATION OF DOL FIDUCIARY RULE

Early this afternoon (Friday, February 03, 2017), President Trump signed an Executive Order directing the Department of Labor (DOL) to halt implementation of final regulations relating to "investment advice fiduciaries," as defined under ERISA and the Internal Revenue Code.

The Order directs the DOL to reevaluate the regulations and to report back to the President. The regulations, collectively known as the "Fiduciary Rule," had been set to take initial effect on April 10, 2017. The Fiduciary Rule's effective date is now expected to be at least delayed, if not also altered or withdrawn.

The purpose of the Fiduciary Rule, which has been over six years in the making, is to impose a fiduciary standard on individuals and companies receiving compensation for retirement investment advice, including brokers and insurance agents who are currently held to a lesser standard dating to 1975.

The rule would also have required brokers to clearly and prominently disclose any conflicts of interest, like hidden fees or other undisclosed commission payments often buried in the fine print.

A 2015 government study concluded that retirement plan savers lose $17 billion, in the aggregate, each year due to receiving conflicted investment advice that reduces the value of their retirement accounts.

The Trump Administration, on the other hand, takes the view that the DOL rule is unnecessary. The White House Press Secretary called the DOL Fiduciary Rule "a solution in search of a problem," and as protecting consumers "from something they don't need protection from." This view reflects the perspective of those who regard the Fiduciary Rule as an unneeded limit upon investor options and its implementation as a burden upon asset management firms.

Industry spokespersons, as well as politicians with competing views are certain to continue to engage in lively debate regarding the future of the Fiduciary Rule.

While such a discussion has been ongoing over recent years, financial advisors and brokers have steadily worked to update their compensation methods to provide greater transparency to retirement plan savers. For this reason, it is not clear that even the elimination of the Fiduciary Rule would reverse the market trend of providing greater clarity regarding the fees and costs of investing.

We will continue to monitor relevant developments.

FEDERAL COURT HOLDS WISCONSIN'S RIGHT-TO-WORK 30-DAY REVOCATION PROVISION UNCONSTITUTIONAL

Wisconsin's Right-to-Work law provides employees the ability to choose as to whether they want to become or remain members of a labor union. Intertwined with that decision is an employee's right to decide not to pay union dues. In order for an employee to effectively exercise his or her right not to be a member of a union without coercion or duress is the ability to also timely revoke their dues check-off authorizations so they are not committed to pay union dues when they no longer want to be a member of the union.

Wisconsin's Right-to-Work law was designed to address this issue by prohibiting any dues checkoff authorizations unless such authorizations are revocable upon 30 days' written notice by an employee. This means, under Wisconsin's Right-to-Work law, that an employee can terminate a dues checkoff authorization upon 30 days' written notice and, moreover, a labor union cannot bind an employee to a period of more than 30 days in which to exercise that right. However, this provision under Wisconsin law runs contrary to the federal Labor Management Relation Act (29 U.S.C. § 186(c)(4)) which permits an employee's authorization for dues check-off to be effective for a period of up to one year or up until the termination date of the applicable collective bargaining agreement, whichever occurs sooner.

Recently, a federal district court in Wisconsin addressed this conflict between the two laws and found that the 30-day revocation provision for dues checkoff authorizations under Wisconsin's Right-to-Work law to be preempted by the federal Labor Management Relation Act (29 U.S.C. § 186(c)(4)), and, as a result, unconstitutional under the Supremacy Clause of the U.S. Constitution. The federal district court premised its holding on a finding that a state law *limiting* the irrevocability of dues checkoff agreements to 30 days directly conflicts with the federal law *permitting* unions to bargain for longer periods of irrevocability. The federal district court further held that the fact that this provision was made part of Wisconsin's Right-to-Work law does not exempt it from federal preemption within the § 14(b) exception to federal preemption.

The federal district court's decision means that a dues check-off authorization that is not revocable for more than one year is lawful and enforceable under 29 U.S.C. § 186(c)(4) despite Wisconsin's Right-to-Work law to the contrary limiting the irrevocability of such authorizations.

The significance of this decision is that labor unions can and will bind employees to continue to pay union dues for up to a year before they can exercise their right to revoke their dues check-off authorization (and usually within a tight revocation window) even though the employee may have decided they no longer want to remain a member of the union. As a result, this federal court decision will have a chilling effect upon employees' right to decide as to whether they want to remain a member of a labor union when they will be compelled by the same union they want to disassociate themselves from into continuing to pay union dues – exactly what labor wanted to accomplish in commencing the lawsuit challenging this provision of Wisconsin's Right-to-Work law.

EXECUTIVE ORDER AFFIRMS COMMITMENT TO REPEAL THE ACA; MAKES NO IMMEDIATE CHANGES FOR EMPLOYERS

Within hours of being sworn in on Friday, January 20, 2017, President Trump signed an executive order (the Order), that affirmed the administration's policy of seeking "the prompt repeal" of the Affordable Care Act (ACA). The Order, however, neither specifically mentions employers nor has any immediate impact on employers' obligations under the ACA.

It is important to note that the one-page Order does not repeal any specific provision of the ACA, much of which is governed by existing law and regulations that cannot be eliminated with the stroke of even the Presidential pen.

Instead, the Order directs the Secretary of the Department of Health and Human Services the heads of other federal agencies “with authorities and responsibilities under” the ACA to “exercise all authority and discretion available to them”, “to the maximum extent permitted by law,” to:

- “waive, defer, grant exemptions from, or delay the implementation of any provision or requirement” of the ACA that “would impose a fiscal burden on any State or a cost, fee, tax , penalty, or regulation burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchaser of health insurance, or makers of medical devices, products, or medications”; and to

- “provide greater flexibility to States and cooperate with them in implementing healthcare programs.”

Each “department or agency with responsibilities relating to healthcare or health insurance” is directed, “to the maximum extent permitted by law,” to:

- “encourage the development of a free and open market in interstate commerce for the offering o healthcare services and health insurance, with the goal of achieving and preserving maximum options for patients and consumers.”

While some pundits have quipped that the Order is a license for employers to cease complying with the ACA or to cease offering health insurance, no such authority is contained in the Order. What the Order may permit is greater discretion in granting “hardship exemptions” from the individual mandate. Federal officials in the new administration might also be more receptive to state requests for waivers under Medicaid.

We advise employers to continue to observe the ACA status quo, which includes continuing to focus on complying with ACA Employer Reporting obligations (using IRS Form 1095-C) for the 2016 calendar year.

This is because, as the Order specifically states, any revision of existing regulations can only be changed under the rules of the Administrative Procedures Act, which requires the public issuance of proposed rules, followed by a period of public input. Despite the new administration’s Order (and the House of Representative’s January 13 vote to begin repealing the ACA), there is no specific change currently available for employers in 2017.

Instead, employers should continue to heed ACA requirements. Only agency rulemaking or congressional action could relieve employers of ACA reporting and other obligations, but either type of action would likely take significant time.

We will continue to monitor developments regarding the possible repeal of the ACA and how any subsequent actions may affect employers’ obligations.