Midterm elections are on the horizon: What will that mean for retirement & health plan legislation?

The most significant obstacle to retirement and health plan legislation in 2018 remains on the horizon: the 2018 midterm elections. The recently approved omnibus spending package was widely viewed as the last best legislative vehicle to include changes to retirement and health policy. Proposals to support health savings accounts (HSAs) and multiple employer plans were late scratches from the final spending packages.

Lockton comment: Frequently, little major legislative action occurs during midterm election campaign season. Not only are most legislators spending a lot of time on the campaign trail, but there are fewer political incentives for passing legislation when the balance of power may soon shift.

The last chance to see benefits plan legislation before the November midterms is likely to be a loophole in the spending bill that left the Federal Aviation Administration (FAA) only funded through September. This sets up FAA reauthorization as another must-pass vehicle before the midterms. Efforts are underway to encourage Congress to include beneficial retirement and health plan legislation as part of the FAA reauthorization. If that doesn’t happen, the next best chance will be a possible budget deal in the fall or during the lame duck session following the midterm elections.

Proposed HSA legislation

Lockton, along with a coalition of plan sponsors, industry groups and other interested parties sent Congressional leaders several letters urging them to include HSA changes in last month’s spending package. The Bipartisan HSA Improvement Act (H.R. 5138) was introduced in the House, but it was not included in the spending package and has yet to be voted on. The proposal makes helpful changes to current HSA rules, including:

- Allows HSA-compatible plans to provide predeductible coverage for services and medications for chronic conditions and for services at on-site clinics and retail clinics (e.g.,
clinics in pharmacies).

- Permits employees to use HSA funds to pay for wellness activities, equipment and gym memberships.
- Conforms HSA rules to other tax code rules to allow parents to use their HSA funds to pay for medical expenses of children who are not dependents through the end of the year in which the child turns 26.
- Permits employees to contribute to HSAs even if the employee’s spouse participates in a general-purpose health flexible spending arrangement (health FSA).
- Makes it easier for employers to add an HSA-compatible plan when the employer sponsors a health reimbursement arrangement (HRA) or health FSA.

**Lockton comment:** Lockton continues to petition members of Congress to include additional language to allow predeductible coverage for telemedicine visits as part of an HSA-compatible plan. Most telemedicine services provide what the HSA rules call “significant benefits in the nature of medical care or treatment,” including the diagnosis and treatment of an array of medical conditions. Accordingly, telemedicine users are not eligible to make HSA contributions if telemedicine visits are available at no or reduced cost before reaching the HSA minimum deductible. This has frustrated plan sponsors who seek to steer plan members toward telemedicine, which can result in cost savings compared to brick-and-mortar office visits.

Lockton will continue to encourage support for this bill as part of a future legislative action.

**Premium payment HRA regulations expected soon**

We expect federal agencies will soon release proposed regulations that provide large employers with more flexibility to reimburse employees for individual insurance policy premiums. President Donald Trump issued an executive order last fall that called for proposed regulations by early February. Among other things, the regulations will need to address whether an employer can meet its Affordable Care Act (ACA) employer-mandate obligation by offering to reimburse employees for their individual health insurance premiums.

**Wellness program regulations remain in question**

The Equal Employment Opportunity Commission (EEOC) recently told a federal court that it is not likely to meet a self-imposed August deadline to issue updated regulations describing how the Americans with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act (GINA) apply to wellness programs. Regulations issued in 2016 were recently vacated by the court beginning Jan. 1, 2019.

One problem for the EEOC is that all regulations must be voted on by the five-member commission. Two seats on the commission are vacant and one commissioner is up for renomination. Nominees for those seats are being held up in the Senate.

**Lockton comment:** The impact of the EEOC’s recent revelation to the court remains unknown. An invitation to a Lockton Compliance Services webinar on the topic will be coming soon.
IRS may be considering family HSA contribution reversal

Tax reform resulted in a $50 reduction of the maximum HSA contribution for HSA-eligible individuals enrolled in other than self-only coverage (see our Alert). Lockton and others have asked the IRS to provide relief for HSA-eligible individuals and plan sponsors who allow HSA contributions through a cafeteria plan. The IRS has acknowledged the challenge and is reportedly considering relief. The timing of any guidance is unknown. Immediate action is not required, so we suspect many will wait to make election changes. (See our Benefits Insight & Guidance publication, “So You Overcontributed to a Health Savings Account – Now What?” It is available from your Lockton account service team.)

State individual mandate activity

Several states continue to examine requirements that all state residents obtain health insurance in the wake of the ACA-imposed individual mandate being eliminated beginning Jan. 1, 2019. These state-based mandates could prove problematic for multistate employers both in terms of reporting obligations and plan design choices. Look for more information on this topic coming from Lockton soon.

Budget Act impacts 401(k) plans

The Bipartisan Budget Act of 2018 includes a couple of provisions that will require employers to review plan design.

- **Hardship Deferral Suspension** - The bill directs the Treasury to delete the six-month prohibition on deferrals following the hardship distribution to qualify for the safe harbor to receive hardship distributions. This provision takes effect for plan years beginning after Dec. 31, 2018.

- **Hardship Distribution Source** - Now earnings on elective deferrals, qualified matching contributions (QMACs) and qualified nonelective contributions (QNECs) may be withdrawn due to hardship. It also modifies how to demonstrate that a distribution is necessary to satisfy a specified need, by deleting the requirement that the participant take all available nontaxable plan loans. These provisions take effect for plan years beginning after Dec. 31, 2018.

  **Lockton comment:** We recommend waiting to make any plan changes until the Treasury Department releases guidance on implementation later this year and then discussing with your recordkeeper.

DOL’s fiduciary rule in big trouble

For nearly eight years, the Department of Labor (DOL) has attempted to expand the definition of Employee Retirement Income Security Act (ERISA) fiduciary advice to include situations where participants receive investment and distribution advice. Their fiduciary rule has been met with numerous challenges and now faces its biggest obstacle yet. The 5th Circuit Court of Appeals (covering Louisiana, Mississippi and Texas) just found the fiduciary rule to be legally impermissible.

So, what does that mean? The 5th Circuit has now vacated the rule, effectively erasing it from ever existing. This renders all the work and changes retirement plans have done over the last two years as pointless.
What happens now? There are some procedural things the DOL can do to try to get the 5th Circuit to reconsider, or it could appeal to the Supreme Court. Our guess is that the DOL will not appeal and may let the rule die. The DOL could also go ahead and modify or repeal the rule itself (unlikely, we think).

**Lockton comment:** What should you do until the Supreme Court issues an opinion? Honestly, nothing. The DOL hasn't enforced the rule since it became effective because the Trump Administration has been decidedly against it. We recommend a wait-and-see approach.

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