

# 2009 Legislative Year in Review and the Outlook for 2010

January 2010

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## About This Material

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This report provides a summary of the federal employee benefits- and human resources (HR)-related legislation enacted from January through December 2009. It also provides an outlook for legislative activities in 2010.

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## Federal Benefits and HR-Related Legislation Enacted in 2009

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2009 began as a historic year with the first ever African-American president taking the oath of office, backed by strong Democratic majorities in both the House and the Senate. It also was a year that saw continuation of probably the deepest economic downturn since the Great Depression. This economic downturn was accompanied by acute stress on the financial services sector along with other sectors, record unemployment levels, and significant interventions by the federal government and the Federal Reserve intended to shore up the faltering economy and stabilize the banking system.

Legislatively, the Obama administration acted quickly to work with Congress to enact an economic stimulus bill, the American Recovery and Reinvestment Act, in February 2009 before taking on the President's other signature domestic issue of comprehensive health care reform, which dominated the remainder of the year. The House was not able to pass a health reform bill until November, and the Senate did not act until late December. (A final health care reform package is expected to be completed in late January or early February and is discussed in further detail below in the Outlook section of this document.)

This part of our report summarizes the highlights of key legislative activity at the federal level in 2009 and discusses the legislative outlook for 2010, all generally from the perspective of employer-sponsored employee benefit and HR programs.

### **Highlights of Federal Legislation Enacted in 2009**

Congress was able to complete action on a few items during 2009, including a huge economic stimulus package that provided subsidies for Consolidated Omnibus Budget Reconciliation Act (COBRA) coverage, imposed restrictions on executive compensation, and extended unemployment insurance benefits. Despite these enhancements, the economy continued to stumble, causing Congress to extend unemployment insurance benefits two additional times in 2009 as well as to further extend the availability of the COBRA subsidy. Given the economic turmoil and the extended time spent on health care reform, other domestic priorities such as a comprehensive overhaul of the financial regulatory system, including executive compensation; immigration reform; and retirement plan reforms have been held over to 2010.

Congress enacted legislation in 2009 in the following areas:

- Health care, including COBRA, health information technology, comparative effectiveness, prevention and wellness, the Trade Adjustment Assistance Act, and the Children's Health Insurance Program;
- Executive compensation;
- Employment and HR, including unemployment insurance, employment discrimination, the work opportunity tax credit, H-1B visas, E-Verify, Family and Medical Leave Act benefits, and arbitration; and
- Other tax issues, including the "making work pay" tax credit, alternative minimum tax relief, and transit benefit parity.

All of these new laws are described in further detail below. In addition, any regulations issued in 2009 to implement these new laws are briefly summarized.

## **Health Care**

### **COBRA**

The American Recovery and Reinvestment Act (ARRA) (P.L. 111-5) was signed into law on February 17, 2009 and included a new federal COBRA subsidy for involuntarily terminated employees. Employees who were involuntarily terminated between September 1, 2008 and December 31, 2009 could receive a subsidy equal to 65% of the COBRA cost charged to the employee. Employees are required to pay 35% of the COBRA premium, and employers pay the other 65%, with the employer then able to claim a credit against income tax withholding and payroll taxes to receive the 65% subsidy. An employee is eligible to receive subsidized COBRA coverage for up to nine months, followed by unsubsidized coverage for another nine months, or until the employee becomes eligible for health care coverage through another employer or Medicare. Eligibility for the subsidy is capped at higher income levels.

The subsidy provision was set to expire at the end of 2009. Therefore, an extension of the eligibility period for the 65% COBRA subsidy from December 31, 2009 to February 28, 2010 was included in the 2010 Department of Defense (DOD) Appropriations Act (P.L. 111-118), which was enacted on December 19, 2009. In addition, the duration of the premium subsidy was extended from nine months to 15 months. The new law added an additional notice requirement that employers must provide individuals who are assistance-eligible at any time on or after October 31, 2009, or who experience a qualifying event on or after that date. These individuals must be provided additional notification with information regarding the extended premium assistance within 60 days after the date of enactment. In the case of qualifying events after the date of enactment, notice must be provided consistent with ARRA's timing of notification requirements.

ARRA's COBRA provisions can be found beginning on page 341 at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h1enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.txt.pdf)

The COBRA provisions in P.L. 111-118 are available beginning on page 64 at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h3326enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3326enr.txt.pdf)

Beginning in February 2009, the Internal Revenue Service (IRS), the Department of Labor's Employee Benefit Security Administration (EBSA), and the Centers for Medicare and Medicaid Services (CMS) issued guidance to employers and workers regarding the new 65% COBRA subsidy, mostly in the form of frequently asked questions (FAQs). These FAQs are updated periodically to reflect new information.

IRS FAQs are available at: <http://www.irs.gov/newsroom/article/0,,id=204708,00.html>

The full text of IRS Notice 2009-27 providing questions and answers on the COBRA premiums is available at: <http://www.irs.gov/pub/irs-drop/n-09-27.pdf>

COBRA ARRA Model Notices are available at: <http://www.dol.gov/ebsa/COBRAmoelnotice.html>

EBSA FAQs are available at: <http://www.dol.gov/ebsa/COBRA.html>

An IRS news release for employers on claiming the COBRA credit, IR-2009-15, is available at: <http://www.irs.gov/newsroom/article/0,,id=204709,00.html>

### **Health Information Technology (HIT)**

ARRA invests approximately \$17 billion for the adoption and use of HIT systems by health care providers who serve Medicare and Medicaid patients. Incentive bonus payments are available to providers who are "meaningful users" of certified HIT systems, with penalties in place for non-adopters beginning in 2014.

ARRA also included the Health Information Technology for Economic and Clinical Health (HITECH) Act, which addresses privacy and security issues related to the electronic transmission of health information in order to encourage the adoption of electronic health records.

The HITECH provisions in ARRA are available beginning on page 112 at:

[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h1enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.txt.pdf)

Pursuant to the HITECH Act, the Department of Health and Human Services (HHS) released an interim final rule on August 19, 2009 regarding the timing and content of the notices required to be sent to individuals whose protected health information (PHI) has been breached as well as the methodologies and technologies that can be used to render PHI “unusable, unreadable, or indecipherable” to unauthorized individuals. The HHS rule applies to Health Insurance Portability and Accountability Act (HIPAA)-covered entities and their business associates.

Separately, the Federal Trade Commission (FTC) August 17, 2009 released a final rule also addressing the timing and content of breach notices that are applicable to personal health record (PHR) vendors and PHR-related entities.

Generally, both sets of rules require covered entities to provide written notification to affected individuals without unreasonable delay and no later than 60 calendar days following the discovery of a breach. The HHS rule became effective September 23, 2009, and the FTC rule became effective September 24, 2009. Full compliance is required by February 22, 2010.

The full text of the HHS interim final rule is available at: <http://edocket.access.gpo.gov/2009/pdf/E9-20169.pdf>

The full text of the FTC final rule is available at: <http://edocket.access.gpo.gov/2009/pdf/E9-20142.pdf>

HHS issued another interim final rule on October 29, 2009 that amends the enforcement provisions of HIPAA to incorporate civil monetary penalties imposed by the HITECH Act. Under the interim final rule, covered entities are subject to a tiered penalty structure based on four categories of HIPAA violations. The categories range from the lowest, which applies to a violation that a covered entity was not aware of and would not have known about even if it had exercised “reasonable diligence,” to the highest, which applies to a violation that was due to willful neglect and not corrected within a 30-day time period. The penalty for the lowest category ranges from a minimum of \$100 per violation up to a maximum of \$50,000 per violation. The penalty for the highest category is set at a flat amount of \$50,000 per violation. The penalties are capped at \$1.5 million annually for multiple violations of the same provision.

The full text of the HHS final rule is available at: <http://edocket.access.gpo.gov/2009/pdf/E9-26203.pdf>

### **Comparative Effectiveness**

ARRA provides \$1.1 billion for comparative effectiveness research through September 30, 2010, which is dedicated to comparing the effectiveness of various health care treatments and strategies to determine the best clinical outcomes.

ARRA’s comparative effectiveness funding provision is available beginning on page 63 at:

[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h1enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.txt.pdf)

### **Prevention and Wellness**

ARRA includes \$1 billion for a new Prevention and Wellness Fund to promote immunizations, assist states in reducing health care-related infections, and carry out evidence-based clinical and community-based prevention and wellness strategies.

ARRA's prevention and wellness funding provision is available beginning on page 66 at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h1enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.txt.pdf)

## **TAA**

ARRA extends the Trade Adjustment Assistance (TAA) program until December 31, 2010. It also expands the health care tax credit (HCTC) from 65% to 80% of the cost of coverage for eligible individuals and allows immediate family members to continue receiving the HCTC for 24 months after the TAA-eligible individual becomes eligible for Medicare, becomes divorced, or dies.

ARRA's TAA provision is available beginning on page 309 at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h1enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.txt.pdf)

## **Children's Health Insurance Program Reauthorization Act**

The Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA) (P.L. 111-3) was enacted on February 4, 2009. CHIPRA reauthorizes the Children's Health Insurance Program (CHIP) through fiscal year 2013 and expands CHIP to cover children in families with incomes up to 300% of the federal poverty level (from 250%). The CHIPRA provisions affecting employers include:

- Employers are required to provide notice to employees of their enrollment rights for premium assistance available through CHIP or face civil penalties;
- Group health plan administrators are required to disclose to states, upon request, information about their group health plans that allows states to determine an employee's eligibility for CHIP premium assistance;
- Employers may opt out of receiving premium assistance directly from the state, in which case the premium assistance subsidy will be paid directly to the employee;
- Employers are required to provide a special enrollment period for employees that lose Medicaid or CHIP coverage; and
- CHIPRA provides wraparound dental benefits under CHIP for families with private insurance.

CHIPRA applies to both public and private employers and generally became effective on April 1, 2009.

The full text of CHIPRA is available at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_public\\_laws&docid=f:publ003.111.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ003.111.pdf)

## **Executive Compensation**

Congress sought to severely restrict executive compensation, especially for those companies that received funds through the Troubled Asset Relief Program (TARP). Under ARRA, executive pay limits are applicable to as many as 25 executives based on a sliding scale tied to the amount of TARP assistance received but exempts restricted stock awards and payments made pursuant to a written employment contract. ARRA prohibits "golden parachute" payments to a TARP recipient's top ten highly compensated employees and directs the Secretary of the Treasury to review past compensation and possibly negotiate for reimbursements. ARRA also requires TARP recipients to create a Board Compensation Committee and institutes an annual "say-on-pay" vote for shareholders to determine executive compensation. Further restrictions on executive compensation are expected in 2010 as discussed in the Outlook section.

ARRA's executive compensation provisions can be found beginning on page 403 at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h1enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.txt.pdf)

On February 24, 2009, the Securities and Exchange Commission's (SEC's) Division of Corporation Finance issued Compliance and Disclosure Interpretations (CDI) on the "say-on-pay" provision of ARRA. The say-on-pay provision requires companies receiving funds under TARP to allow a separate advisory shareholder vote to approve executive pay. Senator Christopher Dodd (D-CT) wrote to SEC Chair Mary Schapiro on February 20, 2009 expressing his view that the say-on-pay provision is applicable to companies filing their definitive proxies on or after February 17, 2009, the day the law was enacted. Other than alluding to Senator Dodd's view as to the effective date of the shareholder voting requirement, the CDI provides no guidance or comment regarding the effective date. The SEC guidance also does not address the effective date for a provision requiring chief executive and financial officers to certify compliance with ARRA's executive compensation and corporate governance requirements.

The SEC's CDI on say-on-pay is available at: <http://www.sec.gov/divisions/corpfin/guidance/arrainterp.htm>

## **Employment and HR**

### **Lilly Ledbetter Fair Pay Act of 2009**

On January 29, 2009, President Obama signed his first piece of legislation into law, the Lilly Ledbetter Fair Pay Act of 2009 (P.L. 111-2). The Lilly Ledbetter Fair Pay Act reverses a 2007 Supreme Court ruling that held that the statute of limitations for filing a claim alleging pay discrimination begins when a discriminatory act occurs and is communicated to the individual. Under the new law, employees may file claims of pay discrimination over an extended period of time by providing that an alleged act of discrimination occurs with the issuance of each paycheck. The law also permits claims beyond pay discrimination and applies to any "other practice" of discrimination that has a connection to compensation. It also eliminates the requirement that a plaintiff have an employment relationship with an employer to bring a discrimination lawsuit by permitting any individual who is "affected by" discrimination to bring a claim. The Lilly Ledbetter Fair Pay Act became effective as if enacted on May 28, 2007.

The full text of P.L. 111-2 is available at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_public\\_laws&docid=f:publ002.111.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ002.111.pdf)

The Equal Employment Opportunity Commission (EEOC) August 14, 2009 announced that it had revised its Compliance Manual section regarding when to file compensation discrimination claims to conform with the Lilly Ledbetter Fair Pay Act. EEOC changed Section 2-IV (C)(4) of its Compliance Manual to track the language of the new law, which provides that a Title VII plaintiff alleging compensation discrimination based on sex, race, disability, or age files a timely EEOC charge if he or she files within 180 days in states without a Fair Employment Practices agency or within 300 days in most states of receiving a paycheck or other benefit allegedly affected by past discrimination.

The revised section of the EEOC Compliance Manual is available at: <http://www.eeoc.gov/policy/docs/threshold.html#2-IV-C-4>

### **Unemployment Insurance (UI)**

The Emergency Unemployment Compensation program, which provides up to 33 weeks of extended benefits, was set to expire on March 31, 2009. However, given the economic situation, Congress extended the UI program through December 31, 2009 as part of ARRA. In addition, ARRA increased weekly unemployment benefits by \$25 and temporarily suspended the federal income tax on the first \$2,400 of unemployment benefits per recipient during 2009. Because of the soaring unemployment rate and the lack of new employment, Congress extended UI benefits two additional times. First, as part of the Worker, Homeownership, and Business Assistance Act of 2009 (P.L. 111-92), enacted November 6, 2009, UI benefits were extended for an additional 14 weeks in all 50 states and for up to 20 weeks in states with a three-month average unemployment rate of at least 8.5%. Then, on December 19, 2009, as part of the DOD Appropriations Act (P.L. 111-118), UI benefits were extended for another two months through July 31, 2010.

ARRA's UI provisions are available beginning on page 322 at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h1enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.txt.pdf)

The full text of P.L. 111-92 is available at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h3548enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3548enr.txt.pdf)

The full text of the unemployment extension provision of P.L. 111-118 is available beginning on page 63 at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h3326enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3326enr.txt.pdf)

### **Electronic Verification**

On October 28, 2009, President Obama signed into law the \$42.8 billion fiscal year 2010 Department of Homeland Security (DHS) Appropriations Act (P.L. 111-83). The law provides for a three-year extension of the E-Verify program, the voluntary, Web-based electronic eligibility verification program offered by the DHS and the U.S. Citizenship and Immigration Services (USCIS), along with the Social Security Administration (SSA). E-Verify enables employers to compare employee information taken from the Form I-9 against records kept in DHS and SSA databases.

The E-Verify provision in P.L. 111-83 is available beginning on page 24 at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_public\\_laws&docid=f:publ083.111.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ083.111.pdf)

DHS Secretary Janet Napolitano announced July 8, 2009 that beginning September 8, 2009, DHS will fully implement a regulation that will award federal contracts only to employers that use E-Verify to check new employee work authorization. This federal contractor rule extends the use of E-Verify to covered federal contractors and subcontractors, including those that receive funds from ARRA.

The full text of the DHS press release is available at: [http://www.dhs.gov/ynews/releases/pr\\_1247063976814.shtm](http://www.dhs.gov/ynews/releases/pr_1247063976814.shtm)

### **FMLA Expansion**

As part of the National Defense Authorization Act for Fiscal Year 2010 (P.L. 111-84) enacted on October 28, 2009, the Family and Medical Leave Act (FMLA) was amended to allow family members of some active duty military members to take qualifying exigency leave, and for family members of some veterans to take military caregiver leave. The FMLA provisions became effective on the date of enactment.

The FMLA provision in P.L. 111-84 is available beginning on page 121 at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_public\\_laws&docid=f:publ084.111.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ084.111.pdf)

### **Binding Arbitration**

The DOD Appropriations Act included a provision that prohibits DOD contractors and subcontractors from requiring predispute binding arbitration agreements as a condition of employment for federal contracts above \$1 million. This provision applies to all Title VII claims (claims alleging discrimination based on race, color, religion, gender, pregnancy, national origin, and sexual harassment) or any tort related to or arising out of sexual assault or harassment, including assault and battery; intentional infliction of emotional distress; false imprisonment; and negligent hiring, supervision, or retention. However, the Secretary of Defense may waive the requirement "to avoid harm to national security interests."

The binding arbitration provision in P.L. 111-118 is available beginning on page 46 at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h3326enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3326enr.txt.pdf)

## **H-1B Visas**

ARRA prohibits companies receiving TARP funds from hiring workers with H-1B visas for two years unless they meet the definition of an H-1B dependent employer.

ARRA's H-1B provision is available beginning on page 191 at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h1enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.txt.pdf)

## **Work Opportunity Tax Credit**

ARRA created two new groups of prospective employees for whom employers can claim a work opportunity tax credit. These new groups are unemployed veterans and disconnected youth. ARRA awards states one-time grants to enact specific reforms designed to increase unemployment compensation coverage among low-wage, part-time, and other jobless workers. All states receive additional administrative funding under ARRA.

The work opportunity tax credit provision of ARRA is available beginning on page 223 at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h1enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.txt.pdf)

On August 12, 2009, the IRS issued Notice 2009-69 to meet the new qualifications for the work opportunity tax credit as implemented under ARRA. The Notice clarifies that an "individual who received a high school diploma or GED certificate at least six months prior to the hiring date and who otherwise satisfies the requirements for a disconnected youth will not fail to qualify as a disconnected youth merely because the individual has been employed at times since graduation, as long as that employment was no more than occasional." The Notice also provided transitional relief for employers hiring unemployed veterans and disconnected youth beginning on or after January 1, 2009 and before September 17, 2009.

The full text of Notice 2009-69 is available at: <http://www.irs.gov/pub/irs-drop/n-09-69.pdf>

## **Other Tax Provisions**

### **"Making Work Pay" Tax Credit**

ARRA provides a tax credit in the amount of 6.2% of earned income, up to \$400 for individuals and \$800 for joint filers, through a reduction in payroll withholding levels in tax years 2009 and 2010 or by claiming the credit on tax returns. The phase-out of the credit begins for taxpayers with adjusted gross income in excess of \$75,000 (\$150,000 for married couples filing jointly).

ARRA's "Making Work Pay" tax credit provision is available beginning on page 195 at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h1enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.txt.pdf)

The IRS announced on May 14, 2009 a new withholding adjustment option for pension plans. The IRS issued revised withholding tables on February 21, 2009 to incorporate the "Making Work Pay" tax credit. Because the tax credit does not apply to pension payments, the revised tables may have resulted in under-withholding for pensioners. The IRS indicated that this new optional procedure for pensions will address that issue. The optional adjustment procedure for use by those paying pensions is available in Notice 1036-P, "Additional Withholding for Pensions for 2009." In addition, the IRS stated that the online version of Publication 15-T, "New Wage Withholding and Advance Earned Income Credit Payment Tables," would be updated. According to the IRS, pension payors are not required to use the new optional procedure and can continue using the February 2009 withholding tables.

The full text of Notice 1036-P is available at: <http://www.irs.gov/pub/irs-pdf/n1036p.pdf>

**Alternative Minimum Tax (AMT)**

ARRA patches the AMT for 2009 by raising the exemption levels to \$46,700 for individuals and to \$70,950 for joint filers.

ARRA's AMT provision is available beginning on page 205 at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h1enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.txt.pdf)

**Transit Parity Benefit**

ARRA equalizes the tax-free benefit employers can provide for transit and parking by temporarily increasing the transit pass/commuter vehicle transportation benefit to \$230 per month, the same as for qualified parking benefits. Prior to ARRA, the transit pass/commuter vehicle benefit was limited to \$120 per month. This provision, as indexed, applies through December 31, 2010.

ARRA's transit parity provisions are available beginning on page 219 at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h1enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.txt.pdf)

The IRS issued Revenue Procedure 2009-21 on March 27, 2009, which implements this temporary increase.

The full text of Revenue Procedure 2009-21 is available at: <http://www.irs.gov/pub/irs-drop/rp-09-21.pdf>

## Outlook for Legislative Activity in 2010

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Congress faces another year of likely intense legislative debate complicated by the positioning of both political parties leading up to the November 2010 mid-term elections, with the dominant legislative theme being to strengthen the U.S. economy.

- Although unemployment shows signs of leveling off, it still remains at high levels and a primary focus in 2010 will be on a “jobs bill,” which the House passed in December 2009 (with additional COBRA provisions) and which the Senate will take up early in 2010. President Obama also has said that he wants to undertake serious legislative efforts to curb future federal budget deficits.
- With the House and Senate having each passed different versions of health reform in 2009, the challenging task in 2010 remains that of reconciling the two bills in a compromise version that can pass in both bodies with virtually no Republican support.
- In addition, the Democratic-controlled Congress and the Obama administration in 2010 will turn its attention to completing a host of other issues that have been awaiting action, such as financial market reforms and retirement plan reforms.
- Immigration reform is another issue that the Obama administration and many in Congress would like to address in 2010. DHS Secretary Napolitano stated in a speech, for example, that immigration enforcement is a necessity and must be achieved in conjunction with comprehensive reform of the immigration system.

With all House seats and more than a third of Senate seats up for grabs in the November 2010 elections, and given the typical historical pattern for the party in power to lose seats in the mid-term elections, the Obama administration and congressional Democrats may seek to pass as much legislation as possible that will further their priorities and continue their strong majorities in Congress. But to do that, they also may need more bipartisan support than the signature legislation of 2009 was able to muster, and there is a major question of whether that will happen. Also, with two prominent Democratic senators having announced their plans to retire rather than stand for election in 2010, the prospects for Senate Democrats to retain the often-required 60-vote margin appear clouded. Nevertheless, the conventional wisdom that “not much legislation will happen in an election year” is likely to be proven wrong again.

### **Health Care**

#### **Comprehensive Health Care Reform**

On December 24, 2009, the Senate passed its sweeping health reform bill, the Patient Protection and Affordable Care Act (H.R. 3590), by a straight party-line vote of 60-39, with all Republicans voting “no.” The House passed its health care reform bill, the Affordable Health Care for America Act (H.R. 3692), on November 7, 2009 by a narrow margin of 220-215, with one Republican voting in favor of the bill and 39 Democrats voting against it. House and Senate Democrats are now working feverishly to complete a conference agreement on a compromise bill that they can pass and send to President Obama by late January or early February. The final compromise measure is expected to remain closer to the Senate-passed bill because of the carefully negotiated agreement crafted in the Senate to gain the requisite votes of all 60 members who caucus with the Democrats. Both the House and Senate bills make significant changes to the health care system that will directly affect employer-provided health plans.

A Hewitt summary of the provisions in each bill can be accessed through the links provided below:

- [Senate Passes Historic Health Care Reform Bill](#)
- [House of Representatives Passes Sweeping Health Care Reform Bill](#)

The full text of the Senate-passed bill (H.R. 3590) is available at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h3590eas.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3590eas.txt.pdf)

The full text of the House-passed bill (H.R. 3962) is available at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h3962eh.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3962eh.txt.pdf)

## **COBRA**

On December 16, 2009, the House approved the Jobs for Main Street Act (H.R. 2847), which is part of a broader appropriations bill. The Senate is expected to take up the bill in early 2010. H.R. 2847 includes provisions that would extend COBRA premium assistance eligibility from December 31, 2009 to June 30, 2010 and that would extend the duration of the premium subsidy from nine to 15 months. The bill also would clarify that subsidy eligibility includes those who lose coverage due to reduction in hours and who subsequently experience an involuntary termination. These individuals would be eligible for premium assistance prospectively. The bill also would clarify that eligibility for retiree health benefits does not disqualify eligibility for the COBRA subsidy. H.R. 2847 would codify existing regulatory guidance that provides a “reasonable interpretation” standard for employer determinations of “involuntary termination” and would apply COBRA enforcement provisions to the premium assistance program.

The full text of H.R. 2847 is available at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h2847eah.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h2847eah.txt.pdf)

## **Executive Compensation**

Legislation making further changes to the regulation of financial services firms as well as to executive compensation rules is likely to remain a focus in 2010. (The Senate health reform bill, for example, makes very significant changes in the corporate deductibility of pay at health insurance companies.)

On December 11, 2009, the House approved the Wall Street Reform and Consumer Protection Act of 2009 (H.R. 4173), a broad bill that seeks to impose new regulations on the U.S. financial system in order to prevent another financial crisis and to create a process to shut down large financial institutions that are “too big to fail” instead of providing a taxpayer bailout. Included in the Wall Street Reform bill is legislation that passed the House on July 31, 2009, the Corporate and Financial Institution Compensation Fairness Act (CFPA) of 2009 (H.R. 3269). The provisions of H.R. 3269 would require separate nonbinding annual advisory votes on executive compensation (“say-on-pay”) and golden parachute payments at public companies. The bill also would require each member of a compensation committee to be independent and would impose independence requirements on compensation consultants. Finally, the bill would require financial institutions to disclose to the appropriate federal regulator whether incentive pay structures are aligned with sound risk management and certain other related disclosures and would permit federal regulators to issue rules prohibiting financial institutions from maintaining incentive pay arrangements that encourage inappropriate risks.

H.R. 4173 also includes other provisions affecting executive compensation. One provision would extend application of the executive compensation restrictions imposed on TARP recipients to those financial institutions for which a receiver has been appointed under the dissolution provisions of H.R. 4173. Another provision would regulate the compensation of senior executives of financial holding companies whose financial distress is determined to pose a threat to financial stability or the economy as established in the bill.

Senate Banking Committee Chairman Christopher Dodd (D-CT) on November 10, 2009 released a discussion draft of legislation to overhaul the regulation of financial institutions. The Restoring American Financial Stability Act of 2009 would require a nonbinding “say-on-pay” vote on executive compensation and would implement policies related to payments to any principal executive officer as a result of a merger or acquisition. The bill also would require compensation committees to be independent as defined by the SEC and require the disclosure of relationships between executive compensation and financial performance. Clawback policies, which enable the recovery of incentive-based compensation from current or former executives following a restatement, also would be required by the bill.

The full text of H.R. 4173 is available at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h4173ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4173ih.txt.pdf)

The full text of the Dodd discussion draft is available at: [http://banking.senate.gov/public/files/AYO09D44\\_xml.pdf](http://banking.senate.gov/public/files/AYO09D44_xml.pdf)

## **Retirement Plans**

### **Pension Funding Relief and Fee Disclosure**

On June 24, 2009, the House Education and Labor Committee, chaired by Representative George Miller (D-CA) approved the 401(k) Fair Disclosure and Pension Security Act of 2009 (H.R. 2989). The bill would:

- Provide defined benefit pension plans more flexibility in how they calculate pension liabilities in 2009 and would temporarily extend the length of time to make up funding shortfalls;
- Require 401(k) plan administrators to disclose additional information to plan sponsors on the breakdown of fees, and require plan sponsors to disclose fee information to beneficiaries and plan participants; and
- Require firms providing investment advice to plan participants to give advice that is independent and free of any conflict of interest.

The Education and Labor Committee has been in discussions with representatives of the House Ways and Means Committee to develop a common bill that both committees could support. A common bill would likely include pension funding relief and fee disclosure. Controversial provisions regarding investment advice are unlikely to be included without significant revisions. Individual Ways and Means Committee members such as Representatives Richard Neal (D-MA) and Earl Pomeroy (D-ND) have offered proposals on fee disclosure and pension funding relief, respectively. These provisions may be attached to a broader bill containing other unrelated provisions. The Ways and Means Committee is expected to consider H.R. 2989 early in 2010.

The full text of H.R. 2989 is available at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h2989ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h2989ih.txt.pdf)

### **Nondiscrimination Rules**

Representative Lloyd Doggett (D-TX) introduced the Retirement Fairness Act (H.R. 4126) on November 19, 2009. The bill would amend the Internal Revenue Code to modify the nondiscrimination rules in qualified retirement plans. The legislation is a signal that the Democratic agenda for 2010 includes legislation to address retirement plan disparities between highly compensated and non-highly compensated employees.

The full text of H.R. 4126 is available at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h4126ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4126ih.txt.pdf)

## **Annuities**

On December 3, 2009, a bipartisan group of senators introduced the Lifetime Income Disclosure Act (S. 2832), which would require plan sponsors of defined contribution plans to inform plan participants on an annual basis of the projected monthly income they could anticipate receiving if they took distributions as annuities, based on the amount of money in their accounts. The bill would require an annual statement similar to what the SSA provides annually to individuals showing projected monthly payments based on current earnings. The bill is the first in a series anticipated in 2010 as interest in annuities and defined contribution plan “decumulation strategies” increases.

Representative Earl Pomeroy (D-ND) June 8, 2009 introduced the Retirement Security Needs Lifetime Pay Act of 2009 (H.R. 2748). This bill would encourage retirees to include annuities as part of their retirement savings plans by providing: 1) a 50% tax exclusion of up to \$10,000 per tax return of lifetime income payments from non-qualified annuities; and 2) a 25% tax exclusion of up to \$5,000 single/\$10,000 joint per tax return of lifetime income payments from qualified plans and individual retirement accounts (IRAs). The bill also would exclude the value of longevity insurance from amounts subject to required minimum distributions (RMDs) and clarify the taxation of payments from partially annuitized contracts.

The full text of S. 2832 is available at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:s2832is.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s2832is.txt.pdf)

The full text of H.R. 2748 is available at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h2748ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h2748ih.txt.pdf)

## **Technical Corrections**

House Ways and Means Chairman Charles Rangel (D-NY) and Ranking Member David Camp (R-MI) introduced the Tax Technical Corrections Act (H.R. 4169) on December 2, 2009. The legislation would make minor changes to current tax laws, including provisions related to employee benefits. H.R. 4169 would clarify Emergency Economic Stabilization Act (EESA) provisions regarding nonqualified deferred compensation from certain tax indifferent parties and whether a partnership is considered a “nonqualified entity.” The bill also would clarify that the aggregation rules do not treat every entity within an aggregated group as a nonqualified entity merely because one entity in the group is a nonqualified entity. H.R. 4169 also would make a correction to the Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART) (P.L. 110-343) by providing that a plan would not fail to be treated as an accident or health plan because it provides for qualified military reservist distributions. Under HEART, a plan does not fail to be treated as a cafeteria plan or health flexible spending account (FSA) if it provides for qualified reservist distributions.

The full text of H.R. 4169 is available at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h4169ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4169ih.txt.pdf)

## **Employment and HR**

### **Immigration Reform**

On December 15, 2009, Representatives Luis Gutierrez (D-IL) and Solomon Ortiz (D-TX) introduced the Comprehensive Immigration Reform for America’s Security and Prosperity (CIR ASAP) Act of 2009 (H.R. 4321). The bill would create a path for an estimated 12 million undocumented immigrants to gain legal residency and citizenship. Senator Charles Schumer (D-NY) is expected to introduce a comprehensive immigration bill in the Senate in January, and that bill is projected to move forward first. The CIR ASAP Act would create a new mandatory employment verification system for employers to verify each new hire’s work authorization. The new system also would allow individuals to electronically access, update, and lock their file for employment purposes. In addition, the bill would allow the recapture of unused employment-based and family-sponsored visas from prior years, exempt several categories of highly skilled workers from the employment-based immigration cap, and create an independent commission that would have the authority

to establish employment-based immigration policies, among other things. The bill would amend the H-1B visa program to require stricter American worker recruitment and would prohibit employers from participating in this program if they conducted mass layoffs in the past year.

The full text of H.R. 4321 is available at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h4321ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4321ih.txt.pdf)

### **Unemployment Insurance**

The Jobs for Main Street Act (H.R. 2847) would extend for six months:

- The emergency unemployment compensation program that provides up to 53 weeks of extended benefits;
- The extended benefits program that provides up to an additional 13 to 20 weeks of benefits in certain states; and
- The federal additional compensation program that increases all UI benefits by \$25 per week.

The full text of H.R. 2847 is available at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h2847eah.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h2847eah.txt.pdf)

### **Child Tax Credit**

The Jobs for Main Street Act (H.R. 2847) would increase eligibility for the refundable child tax credit by removing the \$3,000 earned income requirement for 2010, which would make all low-income working families eligible for the credit.

The full text of H.R. 2847 is available at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h2847eah.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h2847eah.txt.pdf)

### **Other Tax Issues**

#### **Tax Extenders**

On December 9, 2009, the House approved legislation (H.R. 4213) extending for one year \$31 billion in tax cuts that expired on December 31, 2009. The Senate is expected to take up this legislation in early 2010 and would apply it retroactively so that there is no gap in coverage. The bill would extend through December 31, 2010 the above-the-line deduction for qualified medical expenses and for qualified tuition expenses and the tax-free distributions to charity from an IRA of up to \$100,000 per taxpayer, per taxable year.

The full text of H.R. 4213 is available at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h4213rfs.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4213rfs.txt.pdf)

#### **Estate Tax**

The House on December 3, 2009 approved the Permanent Estate Tax Relief for Families, Farmers, and Small Businesses Act of 2009 (H.R. 4154), which would make permanent the 2009 estate tax rate of 45% and exemption levels of \$3.5 million for individuals and \$7 million for couples. The Senate has yet to act. Under current law, the estate tax is repealed for 2010 only and then returns in 2011 to its pre-2001 levels of a 55% tax and an exemption level of \$1 million.

The full text of H.R. 4154 is available at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h4154eh.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4154eh.txt.pdf)

## **Conclusion**

Once the comprehensive health care reform legislation is completed in late January or early February, Congress will turn to the many issues that it did not have a chance to address in 2009 largely because of the singular focus on health care reform in the latter part of the year. Thus, 2010 is likely to prove a very active year despite the looming mid-term elections, as Democrats see this year as their best chance to enact legislation on many of their priority issues, such as jobs creation, deficit reduction, financial system regulatory overhaul, retirement plans, and labor laws. The key question is whether there will be opportunities for bipartisan cooperation in the aftermath of the politically charged and highly partisan health reform debate. Without bipartisan cooperation, it will be more challenging, but certainly not impossible, for these larger pieces of HR and other legislation to win approval, particularly in the Senate.