SCWA Legislative Update

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Congressional Legislative Update

The new Biden Administration has now been at the helm for a busy two weeks. Here are some of the big issues and dynamics that we are watching in the coming weeks and months.

The Split Senate

Before we dive into discussion of the substantive issues, it is important to acknowledge the unique context in which all of this is playing out. The somewhat unexpected turn of events in the Georgia run-off elections left the Senate split 50-50 between the two parties. This is only the fourth time in history that this has occurred, the last time being in 2001 when the Senate was split for a five month period. As most people are aware, when the Senate is split, the Vice President, who is constitutionally designated as the president of the Senate, has the right to cast the deciding vote in the event of a tie. As such, with Vice President's ascension the Senate is now considered to be in the control of the Democrats. However, if the last two weeks have proven anything, negotiating this razor thin margin is not an easy task.

Because the Senate membership is equally split, Majority Leader Schumer and Minority Leader McConnell and their leadership teams needed to reach an agreement as to how they will share power. This arrangement was only just reached yesterday.

Much of the delay in reaching a power sharing agreement surrounded the Senate filibuster – the cloture rule which requires the votes of at least 60 members to move most legislation to a vote. With the use of the filibuster increasing dramatically over the past few decades, a number of Democratic Senators expressed public support for the elimination of the filibuster (which would allow legislation to move to a final vote based on a simple majority). The reason that this was a concern for Minority Leader McConnell is that the filibuster could be eliminated by a simple majority of senators by creating a new Senate precedent – what has commonly been known as the "nuclear option." So Minority Leader McConnell was holding out on reaching a power sharing agreement until he had assurances or clarity as to the future of the filibuster.

Senator McConnell was willing to abandon his condition that the power sharing agreement include a commitment to maintain the filibuster because Senators Joe Manchin (D-WV) and Kyrsten Sinema (D-AZ) publicly stated that they would not support the elimination of the filibuster at this time – meaning that the Democrats would not have the votes to eliminate the filibuster. Not only did this move set the stage for the power sharing agreement it also provides an initial snapshot into the outsized role that certain moderate Senators – in particular Senator Manchin who is generally considered the most conservative Democrat – will have during this Congress. From the perspective of Senator McConnell, he will be acutely aware that, if the Republicans engage in what Senators Manchin and Sinema deem to be obstructionism or the overuse of the filibuster, the two Senators could always change their mind and move to support the elimination of the filibuster. From the perspective of Senator Schumer, even for bills passed through reconciliation (discussed below), he has no votes to lose and will therefore need to make sure that all wings of the party are appeased or that he has bi-partisan support from moderate Republicans like Senators Susan Collins (R-ME), Lisa Murkowski (R-AK) or Mitt Romney (R-UT) to make up for any defections.

As far as the power sharing agreement that was reached, the arrangements will mirror those from 2001 with the Democrats having control of the committees but both parties having an equal number of members on each committee, equal budgets for the minority and majority staffs of each committee and both leaders having the power to move legislation that had been deadlocked in committee to the Senate floor.

COVID Relief

Shortly before his inauguration, President Biden rolled out the details of his proposal for another round of COVID relief legislation – this time bearing a $1.9 trillion price tag. The Biden proposal would include, among other things – additional stimulus checks to individuals, an increase (from $300 to $400) to the federal weekly unemployment benefit enhancement, an increase in the minimum wage to $15, funding for rent assistance and an extension to the federal eviction moratorium, a new small business grant program (separate from PPP), funding for state and local governments and schools and increased funding for vaccinations and testing.

The price tag and a number of the elements of the Biden proposal (including the increased minimum wage) have led to significant push back from Republicans. This week, ten Republicans provided the President with the details of an alternative $618 billion proposal that would include a number of elements from the President's plan – such as stimulus payments, funding for direct COVID response efforts, and small business grants but would leave out some of the others that were high on the President's priority list – including aid for state and local governments and housing assistance. There is no randomness to the fact that the proposal was made by ten Republicans – the magic number that could give President Biden the votes that he needs to have a relief package clear a Senate filibuster. The group of ten met with the President and Vice President yesterday and though reports from the members were favorable – there is no indication that a deal was reached (or close).

In the meantime, while the President has been considering the options for getting bi-partisan support for a package, House Speaker Nancy Pelosi (D-CA) and Senate Majority Leader Chuck Schumer (D-NY) have been teeing things up for the process known as budget reconciliation that would allow large swaths of President Biden's plan to pass with just a simple majority in the Senate. [As an aside, an increase in the minimum wage, along with certain other items in the Presidents $1.9 trillion proposal cannot be taken up through reconciliation so would have to be dropped from the proposal if it is to go through reconciliation.] While Majority Leader Schumer has indicated that it may not be until mid-March that the Senate would take up a reconciliation bill (still affording some time for the Biden Administration to continue to negotiate with Senate Republicans), Pelosi and Schumer are expected to take the first step towards reconciliation on Monday by introducing a budget resolution. Of course, in the Senate the timeline in all of this may be impacted by the fact that the impeachment trial for former President Trump will begin in the Senate today.

Maximizing the Benefit of the Employee Retention Tax Credit (ERTC)

While, as discussed above, Washington is already looking ahead to the next round of COVID relief, it is important for small businesses to make sure that they are taking maximum advantage of the options and opportunities that have been provided in the preceding packages. While most all businesses are generally aware of the second round of Paycheck Protection Program (PPP) loans, we have been finding that many businesses are completely unaware of the Employee Retention Tax Credit (ERTC) and the significant potential benefit it could provide them, particularly if carefully coordinated with a PPP loan. This is largely because until the most recent COVID relief package a company that took a PPP loan was not eligible for the ERTC. The most recent COVID relief package retroactively changes that and now allows a company who received a PPP loan or even one who will receive a second PPP loan to be eligible for the ERTC.

The following is a brief summary of the ERTC for 2020 and 2021. Companies or entities that think they may be eligible for either or both the 2020 or 2021 ERTC, are well advised to discuss this with their accountant and/or its payroll service, if it has one, right away.

First let's look at the ERTC available for the first two quarters of 2021 (the 2021 ERTC). A company with 500 or fewer employees that (i) had operations partially or fully suspended as a result of orders from a governmental authority due to COVID, or (ii) experienced a more than 20% decline in gross receipts in either the first or second quarter of 2021 as compared against the same quarter in 2019. Alternatively, for the first and second quarter of 2021, the employer may qualify if they had more than a 20% decline in gross receipts in the immediately preceding quarter as compared against that same quarter in 2019 (further IRS guidance on the use of this alternative is forthcoming). In other words, for those businesses that are relying on a decline in gross receipts for eligibility, a quarter can qualify by looking to the same quarter in 2019 or (for the first two quarters in 2021) to the previous quarter as compared against the same quarter in 2019, in either case looking for a 20% drop in revenue compared to what it experienced two years earlier. 2020 is omitted in the comparisons for 2021 because the focus instead is on a "normal" year (2019) versus an impacted year (2021 or the last quarter of 2020 for the purposes of the first quarter of 2021). However, if a business did not exist in a 2019 quarter, its 2020 counterpart may be used in the computation.

If in a quarter, the company exceeds 80% in gross receipts compared to the same quarter in 2019 the company will not be not be eligible for the ERTC. For wages paid between January 1 and June 30, 2021, the credit amount is equal to 70% of qualifying wages (which includes qualified health care expenses) of up to $10,000 a quarter. This equals a maximum credit of $14,000 per employee through June 30, 2021. The credit can be retained from payroll tax deposits which will provide immediate cash to the company.

The new law even allows companies to go back to wages paid after March 12, 2020 and before January 1, 2021, in order to obtain the ERTC (the 2020 ERTC); however the credit for 2020 payroll is not as beneficial as the ERTC for wages paid in the first two quarters of 2021. In order to be eligible for the 2020 ERTC the company either had (i) operations partially or fully suspended as a result of orders from a governmental authority due to COVID, or (ii) had more than a 50% decline in gross receipts in any quarter of 2020 compared to the same quarter in 2019. For employers with 100 or fewer employees, for wages paid between March 12, 2020 and December 31, 2020, the credit amount is equal to 50% of qualifying wages of up to $10,000 a year. This equals a maximum tax credit of $5,000 per employee for qualifying 2020 wages. For employers with more than 100 employees, the credit is only available for those employees who were not performing services.

501(c) tax exempt organizations only qualify for the ERTC if they partially or fully suspended all operations in 2020 or 2021.

Because under the new law PPP funds and ERTC cannot be used to cover the same payroll costs, it is important to allocate as much of the 40% of expenses other than payroll that can be used for forgivable PPP loan purposes so that the company is leaving as much payroll as possible to be covered by the ERTC. The new law expanded the expenses that can be used for loan forgiveness – some of the changes being expenditures for PPE for employees, disability insurance and group term life insurance costs.

Business Deductions for Expenses Covered with PPP Loan Funds

As small businesses look ahead to tax season it is also important to report another big win for small business that came out of the most recent COVID legislation. This was a reversal of the IRS position that prohibited companies from deducting expenses paid with proceeds from PPP loans whether already forgiven or to be forgiven in the future. Because of this change, companies will now be able to deduct all expenses paid with forgiven or to be forgiven PPP loan proceeds. This change is very welcome in that it will free up needed cash for small businesses that would otherwise be used to paying taxes on unanticipated taxable income because these expenses (such as payroll!) could not have been deducted. We applaud Congress for giving small business this much needed relief.