SCWA Legislative Update

May 10, 2021

Highway Bill Negotiations Continue

Roundtable discussions were recently held with Senate Environment and Public Works (EPW) Committee Ranking Member Shelley Moore Capito (R-WV). Senator Capito discussed how bipartisan negotiations on the path forward on the transportation reauthorization continue with the White House and the EPW Committee Democrats. Discussions are progressing regardless of media reports but of course the most difficult things to determine will be the overall funding level and the pay-for.

On April 22nd, Senators Shelley Moore Capito (R-W.Va.), Ranking Member of the Environment and Public Works (EPW) Committee; Roger Wicker (R-Miss.), Ranking Member of the Commerce, Science, & Transportation Committee; Pat Toomey (R-Pa.), Ranking Member of the Banking, Housing, & Urban Affairs Committee; Mike Crapo (R-Idaho), Ranking Member of the Finance Committee, and John Barrasso, Ranking Member of the Energy and Natural Resources (ENR) Committee, released a $568 billion infrastructure framework.

The framework covers a five-year period and is intended to serve as a guide as Congress continues to craft bipartisan bills that will hopefully move by regular order. The framework defines infrastructure as: roads and bridges; public transit systems; rail; safety; drinking water and wastewater infrastructure; inland waterways and ports; airports; broadband infrastructure; and water storage. This is of course a much narrower approach then the White House's recent proposal.

Both the Senate and House are continuing to strive for transportation reauthorization markups by the end of the month.

Senator Capito mentioned that the EPW Committee is working towards a potential May 26th markup of their bill.

UPDATE: Biden's Death Tax Proposals

SCWA was one of 150+ organizations that joined a coalition letter supporting Senator John Thune and Reps. Jason Smith/Sanford Bishop's Death Tax Repeal Act.

Our immediate goal this year was protecting the TCJA improvements to the estate, gift, and generation skipping taxes and the Biden administration has reportedly decided not to recommend any changes to the current estate tax rate or exemption (for now). This small sigh of relief comes though as the administration is proposing a number of other tax increases that could be equally or more harmful to family businesses across multiple industries.

The most concerning proposal for family businesses in the newly released "American Families Plan" is the creation of what amounts to a second death tax with a much lower exemption. Private businesses that started with little or no “basis” and have grown significantly throughout the years will face a tax and compliance nightmare if the administration’s capital gains due at death and step up in basis proposals become law. An example of how the capital gains due at death proposal would work for a $50 million private business is pasted below for reference.

Please stay tuned for more updates as Congress begins to consider how to move forward on the administration’s legislative proposals.

Biden's Death Tax Plan

Under Joe Biden’s second death tax plan, before a business pays the death tax it must first pay capital gains taxes due at death on gains of more than $1 million ($2 million per couple, $2.5 million when including existing primary home exemption). Using an example of a $50 million business, $8 million basis, and $2 million exemption:

Capital gain after exemption: $40 million

Capital gains tax rate: 43.4%

Capital gains tax owed: $17.36 million
After paying the capital gains due at death, the business owner must also pay the death tax on the remaining assets in the estate.

Value of remaining estate: $32.64 million

Estate tax exemption (with spousal portability): $23.4 million

Taxable estate: $9.24 million
Estate tax rate: 40%

Death tax owed: $3.7 million
Taken altogether the business would be forced to pay $21 million in death and capital gains taxes, versus the $10.6 million that would be owed under current law. State transfer taxes are not figured into this example but some states still impose an additional transfer tax on top of the federal estate tax.

The Biden plan claims it will include protections for family businesses that remain operating, however previous attempts at exemptions to the estate tax for family businesses have failed to adequately protect these businesses.

The plan as it exists now could put thousands of family businesses at risk as they seek to pass to the next generation of ownership.

U.S. Department of Labor to Withdraw Independent Contractor Rule

The U.S. Department of Labor announced the withdrawal – effective May 6 – of the "Independent Contractor Rule," to protect workers' rights to the minimum wage and overtime compensation protections of the Fair Labor Standards Act (FLSA).

The Department is withdrawing the rule for several reasons, including:

- The independent contractor rule was in tension with the FLSA's text and purpose, as well as relevant judicial precedent.
- The rule's prioritization of two "core factors" for determining employee status under the FLSA would have undermined the longstanding balancing approach of the economic realities test and court decisions requiring a review of the totality of the circumstances related to the employment relationship.
- The rule would have narrowed the facts and considerations comprising the analysis whether a worker is an employee or an independent contractor, resulting in workers losing FLSA protections.

Withdrawing the independent contractor rule will help preserve essential workers' rights. The FLSA includes provisions that require covered employers to pay employees at least the federal minimum wage for every hour they work and overtime compensation at not less than one-and-one-half times their regular rate of pay for every hour over 40 in a workweek. FLSA protections do not apply to independent contractors.

In addition to preserving access to the FLSA's wage and hour protections, the department anticipates that withdrawing the independent contractor rule will also avoid other disruptive economic effects that would have been harmful to workers had the rule gone into effect.

For more information about the FLSA or other laws enforced by the Wage and Hour Division, visit https://www.dol.gov/agencies/whd, or call toll-free 1-866-4US-WAGE.

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