

Beltway Buzz, May 29, 2020

May 30, 2020

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The Beltway Buzz is a weekly update summarizing labor and employment news from inside the Beltway and clarifying how what's happening in Washington, D.C. could impact your business.





Historical Week in the House. The U.S. House of Representatives reconvened this week for its first multi-day workweek since March (the U.S. Senate remained at home this week on a prescheduled Memorial Day week break). The House made history when, for the first time ever, it allowed absent lawmakers to cast votes via a [proxy system](#) (74 members, all Democrats, voted by proxy to approve sanctions against Chinese officials for their detainment of Uyghurs). House Republicans oppose the proxy system and have filed a federal lawsuit challenging the constitutionality of the proxy voting arrangement. For now, this proxy voting process is at least one way in which the House plans to reduce the risks of legislating during the current healthcare crisis.

House Passes PPP Fix. On May 28, 2020, the House passed by a vote of 417-1 (voting again via the proxy system), the Paycheck Protection Program Flexibility Act fix that the *Buzz* discussed briefly [last week](#). While the fix is still intended to provide borrowers with more flexibility with how they use their loans, it does not entirely eliminate the requirement that employers use 75 percent of the loan on payroll costs. Instead, the bill lowers this requirement to 60 percent. The bill also:

- Expands from 8 to 24 weeks the period in which borrowers must use loans;
- Allows borrowers whose loans have been forgiven to defer payroll taxes; and
- Extends the rehiring deadline from June 30, 2020, to December 31, 2020, (with exceptions relating to employee unavailability).

The bill now heads to the Senate for consideration.

UI Update. Discussions are heating up in Congress about whether to extend the [Coronavirus Aid, Relief, and Economic Security \(CARES\) Act's Federal Pandemic Unemployment Compensation](#) program, which provides workers who receive state unemployment benefits an extra \$600 each week, beyond its July 31, 2020, expiration date. Critics of the program maintain that the \$600 premium creates a disincentive for employees to return to work. An alternative floated by Senator Rob Portman (R-OH), would use unemployment insurance (UI) funds to pay individuals a weekly \$450 bonus (through July 31) if they return to work. Of course, our legislators respond most effectively in the face of looming deadlines, so the *Buzz* doesn't expect too much immediate action on this matter.

OSHA Construction Guidance. On May 26, 2020, the Occupational Safety and Health Administration (OSHA) issued [guidance](#) to assist construction employers and workers in reducing the risk of coronavirus exposure in construction workplaces. For example, for essential or emergency indoor work, the guidance recommends physical barriers (e.g., walls, doors, and plastic sheathing) to separate workers from individuals experiencing signs associated with coronavirus. The guidance also recommends the use of staggered work schedules, identification of choke points (e.g., hoists and elevators), proper cleaning of bathroom facilities and handwashing stations, as well as the role of personal protective equipment (PPE). [Phillip B. Russell](#) and [Arthur G. Sapper](#) have the [details](#).

OSHA Hearing. Speaking of OSHA, on May 28, 2020, the House's Workforce Protections Subcommittee held a hearing entitled, "Examining the Federal Government's Actions to Protect Workers from COVID-19." OSHA's Principal Deputy Assistant Secretary Loren Sweatt testified. Democrats on the subcommittee criticized OSHA for relying on voluntary guidance, rather than enforceable standards. On the other hand, Principal Deputy Assistant Secretary Sweatt stressed the benefit of flexibility of issuing guidance documents and noted that existing standards (e.g., respiratory protection, PPE, eye and face protection, sanitation, and hazard communication) have informed OSHA's enforcement approach to the crisis.

Regulatory Uncertainty. This past weekend may well have been a stake in the ground for the administration's regulatory agenda. That is because regulations finalized from now on are potentially at risk of being overturned in the 117th Congress (beginning in 2021) pursuant to the Congressional Review Act (CRA). Generally speaking, the CRA allows Congress to rescind agency regulations within 60 days of the rule being submitted to Congress, but if those 60 days don't expire by the time Congress adjourns, it restarts in the next Congress. While Congress's schedule is a bit unpredictable (especially this year), we could be within the timeframe in which the next Congress could review and rescind regulations finalized henceforth. Of course, this really only matters if Democrats control Congress and the White House.

Sick Chicken. This week back in 1935, the Supreme Court of the United States decided *A.L.A. Schechter Poultry Corporation v. United States*—one of the most famous Supreme Court cases concerning the U.S. Constitution's commerce clause. The case involved the National Industrial Recovery

Act (NIRA)—a statute passed in 1933 intended to help the country recover from the Great Depression. The NIRA empowered private trade groups to establish local industrial codes to set minimum prices for goods, set minimum wage rates, etc. (more than 500 local practice codes were eventually adopted around the country). Pursuant to the NIRA, the president signed the Live Poultry Code that regulated the chicken industry, which was centered in the City of New York. In 1934, the Schechters, who bought and sold chickens around New York, were arrested and convicted for violating the minimum wage and maximum hour provisions of the code and for selling unfit chickens (which is why the case is often described as the “Sick Chicken” case). The Schechters appealed all the way to the Supreme Court, which unanimously ruled in their favor, while striking down the NIRA as unconstitutional. The Court reasoned that the Constitution only gave Congress the power to regulate *interstate* commerce, while the conduct regulated by the NIRA was *intrastate* commerce.

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Unhappy with the decision, President Franklin Roosevelt criticized the Court’s “horse-and-buggy commerce,” and threatened to pack the Court with justices that would uphold his decision. While commerce clause jurisprudence would expand and contract over the years, the Schechter case, at least one element of the case is still very much with us today: the Fair Labor Standards Act (FLSA). The FLSA’s provisions enacted under the authority of the NIRA were later codified in the Fair Labor Standards Act of 1938.



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