SSDA SERVICE STATION DEALERS OF AMERICA AND ALLIED TRADES

SSDA News

Service Station Dealers of America and Allied Trades

VOLUME 27, ISSUE 11 DECEMBER, 2013

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LEGISLATIVE UPDATE

By Roy Littlefield

The President's solution for addressing the outcry about the fact insurance companies have been cancelling policies for individuals because they do not have the minimum benefit coverage required by the Patient Protection and Affordable Care Act, is a letter from a bureau chief in the Department of Health and Human Services to state insurance commissioners.

You have to look closely to find the authority for the action. Actually, you don't have to look closely because it isn't there. This is the only authority we can find in the letter: "Under the following transitional policy, health insurance issuers may choose to continue coverage that would otherwise be terminated or cancelled, and affected individuals and small businesses may choose to re-enroll in such coverage....The Department of Health and Human Services has conferred with the Departments of Labor and the Treasury with respect to those market reforms with respect to which there is shared jurisdiction. With respect to those market reforms, the Departments of Labor and the Treasury concur with the transitional relief afforded in this document."

Here's the transition policy:

"Under this transitional policy, health insurance coverage in the individual or small group market that is renewed for a policy year starting between January 1, 2014, and October 1, 2014, and associated group health plans of small businesses, will not be considered to be out of compliance with the market reforms specified below under the conditions specified below."

Here are the market reforms that do not have to be met:

- Section 2701 (relating to fair health insurance premiums);
- Section 2702 (relating to guaranteed availability of coverage);
- Section 2703 (relating to guaranteed renewability of coverage);
- Section 2704 (relating to the prohibition of pre-existing condition exclusions or other discrimination based on health status), with respect to adults, except with respect to group coverage;
- Section 2705 (relating to the prohibition of discrimination against individual participants andbeneficiaries based on health status), except with respect to group coverage;
- Section 2706 (relating to non-discrimination in health care);

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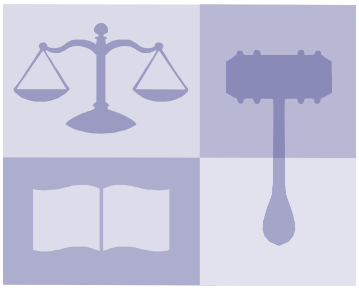
GENERAL COUNSEL CORNER



Open Supply in the District of Columbia – One Case Ends, Another Begins

By Peter H. Gunst
pgunst@lawyers.com

The District of Columbia Code contains a unique provision that, on its face, prohibits inclusion in a dealer's supply agreement of any provision that completely restricts the dealer from obtaining product from alternative suppliers.

In instances where the marketing agreement permits the dealer to use the supplier's trademark, the agreement may only require that the motor fuels resold to the public by the dealer "be of a reasonably similar quality" to the supplier's product, and that the dealer not misrepresent the product's source. D.C. Code § 36-303.01(a)(6) and (11).

A lawsuit filed almost seven years ago in the Superior Court of the District of Columbia, *Kazemzadeh v. Eastern Petroleum Corp.*, relied upon that law to challenge an exclusive supply provision contained within a marketing agreement between a dealer and its then supplier, Eastern Petroleum Corporation.

Over three years ago, in August 2010, the trial court issued its Omnibus Order, which in part dealt with the dealer's claim against its supplier under the District of Columbia statute.

Finding that the exclusive dealing provision did indeed violate District of Columbia law, the court stated that the dealer should "be permitted to sell other brands of motor fuel so long as the quality of fuel is similar *and* there is no representation that the 'other' brands were obtained" from its supplier or under its supplier's trademark. The court's order, however, left many other issues unresolved so it was not a final, appealable decision.

Thereafter, the case stagnated, at least in part because Eastern Petroleum Corporation went out of business. Ultimately, the litigation was dismissed by agreement in October of this year.

Now, in a new case filed in late August 2013, the Attorney General for the District of Columbia has again raised the issue of the effect of the District's open supply law in an action brought against ExxonMobil and distributor Joe Mamo's marketing entities, styled *District of Columbia v. ExxonMobil Oil Corporation, et al.*

The Attorney General complains that Mr. Mamo's companies have come to dominate the District of Columbia market as "the exclusive gasoline suppliers for about 60% of the approximately 107 retail gasoline stations" located in the District.

That domination resulted, according to the Attorney General, in large part from Mr. Mamo's acquisition in 2009 of 31 Exxon-branded gasoline stations in the District.

The Attorney General claims that as a result of Mr. Mamo's market dominance and the imposition of exclusive supply requirements on the independent dealers who operate the

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"Owners/ lessees are required to make reasonable modifications to barriers in public areas of existing facilities that deny equal access to individuals with disabilities. "

Pennsylvania Transit-Funding Bill on Hold

A bill that would provide billions of dollars in new funding for roads, bridges, and mass transit in Pennsylvania won't come to a vote this month.

House Speaker Sam Smith (R., Jefferson), one of the lead negotiators in the effort to reach an agreement on transportation funding, said Tuesday that legislative leaders would be continuing discussions over the next few weeks, and hope to map out a proposal that could be voted on by mid-November.

In doing so, Smith backed away from earlier assertions that transportation talks will die on the legislative vine if a deal is not reached this week.

Asked whether he was optimistic about talks going forward, Smith said: "I can't answer that. I honestly can't."

That is because there is still a deep divide between Republicans and Democrats in the House over a GOP demand that any transportation funding deal include changes to the state's prevailing wage laws for transportation projects. Those laws require contractors on state-funded construction projects costing more than $25,000 to pay specific wages for various jobs. The wages are set by the state Department of Labor and Industry and are generally tied to those in the area's organized labor contracts.

House Republicans have long argued that prevailing-wage laws drive up the costs of construction projects and that the wages set do not always coincide with local wages, particularly in rural communities. They want to raise the $25,000 threshold, a standard set more than 50 years ago. Another change the GOP is pushing is to exempt routine maintenance projects, such as minor resurfacing projects and curb repairs, from prevailing wage.

House Democrats have balked at such proposals: "House Democrats don't see any reason to tamper with that law," said spokesman Bill Patton.

But Smith on Tuesday made his stance clear on prevailing wage: "If that is not a part of [the deal], then I'm not a part of it."

Transportation funding is one of Gov. Corbett's top policy priorities, particularly as he eyes a reelection campaign next year. And the GOP-controlled legislature has been under pressure for months to resolve its differences because of the potential consequences of not doing so.

Without additional funding, bridges in disrepair are likely to be weight-restricted, mass-transit systems, such as SEPTA, will have to scale back projects, and deteriorating roadways will make smooth and safe travel difficult for motorists.

Congress Eyes Virginia's Model for Funding Transportation Projects

The model for fixing the federal transportation funding shortfall may lie just across the Potomac River.

Virginia enacted a plan this year that is projected to bring in $5.9 billion for transportation projects over the next five years — without increasing the per-gallon gasoline tax.

In fact, Virginia did away with its statewide 17.5 cents-per-gallon tax at the gas pump entirely, in favor of a new wholesale tax of 3.5 percent on gasoline and 6 percent on diesel, along with an increase in the state's general sales tax. In the heavily populated Washington suburbs and Tidewater area, motorists pay an extra 2.1 percent sales tax on gas purchases. Drivers of electric vehicles pay a $64 annual fee.

The idea of a wholesale tax replacing a fee assessed at the pump is getting close attention in Congress, as lawmakers preparing to write a new surface transportation authorization next year look for creative ways to shore up the Highway Trust Fund. The fund relies primarily on per-gallon taxes on gasoline and diesel, which have slumped as motorists drive less and embrace fuel-efficient vehicles. In recent years, Congress has supplemented the trust fund with direct appropriations.

A wholesale tax on motor fuels would solve one of the central problems facing the trust fund by naturally adjusting for inflation. The per-gallon tax of 18.4 cents for gasoline and 24.4 cents for diesel hasn't been increased since 1993, so the trust fund's buying power has steadily eroded with rising prices. Taxing a percentage of wholesale motor fuels costs would boost revenue as prices rise without forcing lawmakers to revisit the question with politically painful votes to raise taxes.

"Several states are turning to a percentage highway fee that is paid for at the refinery level," Senate Environment and Public Works Chairwoman Barbara Boxer, D-Calif., said last month at a hearing on highway financing. "This could bring in more than all of the other taxes bring in for transportation."

Sean T. Connaughton, Virginia's Transportation secretary, says the wholesale tax should provide more long-term stability than the cents-per-gallon tax that it replaced.

"We were able to show our legislature that we weren't going to have enough money, even for federal matches, by 2017," he said.

Voters Oppose Corporate Tax Cuts but Favor Minimum Wage Hike, Poll Finds

Progressive Democrats are using new polling results to continue their push for increasing Maryland's minimum wage to $10 an hour, while they reject attempts to lower corporate taxes.

A minimum wage hike and corporate tax cut are being discussed by General Assembly leaders ahead of the 2014 session.

The survey conducted by Gonzales Research and Marketing Strategies for Progressive Maryland, a coalition of liberal groups, found overwhelming support for increasing the minimum wage from $7.25 to $10.10, with more than 82% favoring the move. Support was strong from all groups — Democrats, Independents and even Republicans, as well as whites, blacks, men and women.

The results are similar to those found in a Goucher College poll released last week, but the Gonzales poll used a larger sample of 819, and surveyed only likely voters. The margin of error was 3.5%.

The poll also found 56% opposed reducing the corporate income tax rate from 8.25%. Respondents were not told that the rate is higher than neighboring states.

In a question paid for by the United Food and Commercial Workers union about a corporate tax method called "combined reporting," those surveyed were given additional information that may have influenced their strong 70% support for the method that has been introduced every year by liberal legislators but opposed by business groups.

Reacting to the poll, Progressive Maryland's Executive Director Kate Planco Waybright said, "Combined reporting is the most effective means of countering complex tax avoidance schemes devised by corporate lawyers and accountants to hide profits from state taxation."

"Closing this gaping tax loophole that now allows big companies to shelter their profits from being taxed in Maryland would typically raise about $90 to $140 million more in badly needed revenue per year. It would add equity and level the playing field for small businesses, which compete against national chains like Walmart and Pizza Hut that often pay no corporate income tax in Maryland."

"We think it would be hard to accurately describe combined reporting in a two-sentence poll question," said Will Burns of the Maryland Chamber of Commerce. "It is a complicated and nuanced corporate taxing system with multiple variables. To think that we could and should condense such a complex system down for the public so we could legislate by polls is not the direction that we should go."

Burns said his shows the need to make Maryland even more competitive "in terms of economic growth, business investment and job creation – a task we are working towards through a Maryland Competitiveness Coalition."

"Closing this gaping tax loophole that now allows big companies to shelter their profits from being taxed in Maryland would typically raise about $90 to $140 million more in badly needed revenue per year."

MDE Begins Stage II Decommission in Maryland, Sort of...

By Roy Littlefield, IV

The Maryland Department of the Environment (MDE) has finally decided to begin the process of moving away from Stage II Vapor Recovery. The decommissioning of Stage II began on July 8, 2011 when the EPA released a policy called "Widespread Use for On-board Refueling (ORVR) and Stage II Waiver." The Clean Air Act (CAA) allows the EPA to waive Stage II Vapor Recovery Programs when these new on-board or "ORVR" systems are in widespread use in the vehicle fleet. This EPA action proposed June 30, 2013 as the date that ORVR will be in "widespread use" nationwide. Maryland in response is claiming that EPA's guidance was never meant to force states to shut down the program immediately and that States are required to perform analyses to determine the loss of emission reduction benefits and to identify further reductions needed if Stage II is eliminated. In order to eliminate Stage II, the EPA requires states to submit a SIP revision (a modification to the States air quality plan called the "State Implementation Plan or SIP"). Maryland is claiming that before Stage II can be removed from the SIP, the emission reductions that will be lost (the "shortfall") must be addressed. It should be noted that the EPA has not received a SIP revision from any of the states that have already eliminated Stage II and are not pushing these states to act quickly with a proposal.

MDE firmly believes that a shortfall (loss of VOC emission reductions) will be created by eliminating Stage II. In order to respond to this "shortfall", MDE is introducing a Stage II Decommissioning Policy. This policy currently would include: electric vehicle charging requirements, low permeation hoses, dripless nozzles, Stage I requirements, and enhanced testing and monitoring.

Under the current proposal, new stations built after January 1, 2014 that are considered small (pumping 300,000 gallons a month or less) are not required to install and operate a Stage II vapor recovery system. The small stations already in existence may decommission after January 1, 2017 or by January 1, 2014 if they have an Electric Vehicle Charging plan in place. For larger stations (pumping greater than 300,000 gallons a month) that are constructed after January 1, 2014 may install and operate a Stage II vapor recovery system or not install Stage II vapor recovery system but meet the requirements for Electric Vehicle Charging plans. For larger stations already in existence, they may decommission Stage II after January 1, 2017 if the requirement to implement an Electric Vehicle Charging plan is met. They can also decommission Stage II by January 1, 2014 if they submit an Electric Vehicle Charging plan with early installation plans.

With the current proposal, some dealers may be better off keeping Stage II given that the cost of an Electric Vehicle Charging station can run over $50,000. MDE is convinced that Electric Vehicle Charging stations are "good for the environment and good for business." SSDA-AT disagrees with the proposed regulation and is fighting to eliminate some of the new proposed requirements. SSDA-AT is currently serving on the MDE committee to address Stage II and we hope to have a consensus that will permanently eliminate Stage II in a way that makes sense for business owners.

2014 Tax Season to Start Later Following Government Closure; IRS Sees Heavy Demand As Operations Resume

The Internal Revenue Service announced a delay of approximately one to two weeks to the start of the 2014 filing season to allow adequate time to program and test tax processing systems following the 16-day federal government closure.

The IRS is exploring options to shorten the expected delay and will announce a final decision on the start of the 2014 filing season in December, Acting IRS Commissioner Danny Werfel said. The original start date of the 2014 filing season was Jan. 21, and with a one- to two-week delay, the IRS would start accepting and processing 2013 individual tax returns no earlier than Jan. 28 and no later than Feb. 4.

The government closure came during the peak period for preparing IRS systems for the 2014 filing season. Programming, testing and deployment of more than 50 IRS systems is needed to handle processing of nearly 150 million tax returns. Updating these core systems is a complex, year-round process with the majority of the work beginning in the fall of each year.

About 90 percent of IRS operations were closed during the shutdown, with some major workstreams closed entirely during this period, putting the IRS nearly three weeks behind its tight timetable for being ready to start the 2014 filing season. There are additional training, programming and testing demands on IRS systems this year in order to provide additional refund fraud and identity theft detection and prevention.

"Readying our systems to handle the tax season is an intricate, detailed process, and we must take the time to get it right," Werfel said. "The adjustment to the start of the filing season provides us the necessary time to program, test and validate our systems so that we can provide a smooth filing and refund process for the nation's taxpayers. We want the public and tax professionals to know about the delay well in advance so they can prepare for a later start of the filing season."

The IRS will not process paper tax returns before the start date, which will be announced in December. There is no advantage to filing on paper before the opening date, and taxpayers will receive their tax refunds much faster by using e-file with direct deposit. The April 15 tax deadline is set by statute and will remain in place.

However, the IRS reminds taxpayers that anyone can request an automatic six-month extension to file their tax return. The request is easily done with Form 4868, which can be filed electronically or on paper.
IRS processes, applications and databases must be updated annually to reflect tax law updates, business process changes, and programming updates in time for the start of the filing season.

The IRS continues resuming and assessing operations following the 16-day closure. The IRS is seeing heavy demand on its toll-free telephone lines, walk-in sites and other services from taxpayers and tax practitioners.

During the closure, the IRS received 400,000 pieces of correspondence, on top of the 1 million items already being processed before the shutdown.

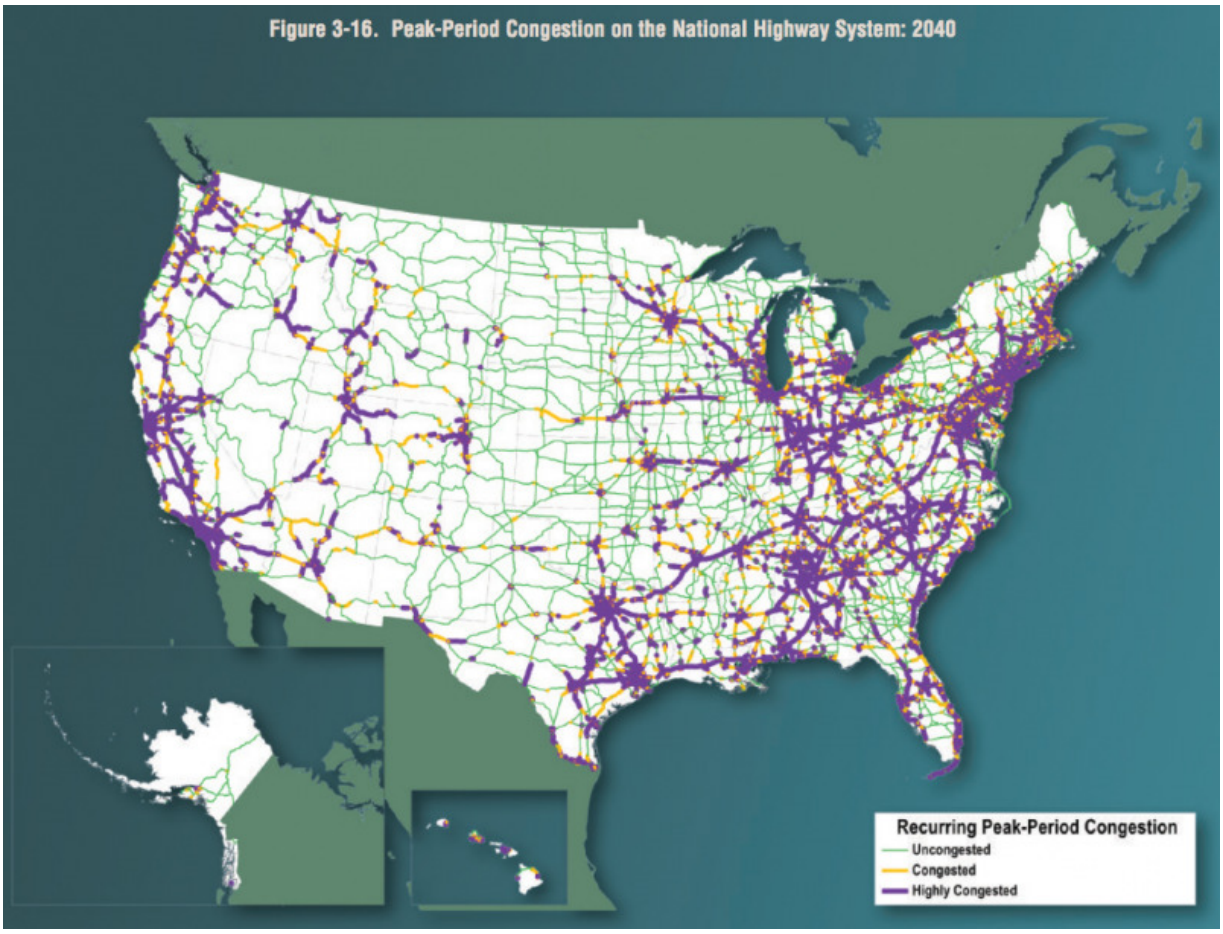
The IRS encourages taxpayers to wait to call or visit if their issue is not urgent, and to continue to use automated applications on IRS.gov whenever possible.

"In the days ahead, we will continue assessing the impact of the shutdown on IRS operations, and we will do everything we can to work through the backlog and pent-up demand," Werfel said. "We greatly appreciate the patience of taxpayers and the tax professional community during this period."

Nightmare Map Shows How The Northeast Is On Its Way To Becoming One Gigantic Traffic Jam

Bloomberg's Joshua Zumbrun points US to data from the Federal Highway Authority projecting what traffic on America's highways will look like in 2040 if we don't expand capacity to accommodate growing demand.

It's real bad. Huge swaths of the country will basically be a gigantic traffic jam.



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Nightmare Map Shows How The Northeast Is On Its Way To Becoming One Gigantic Traffic Jam

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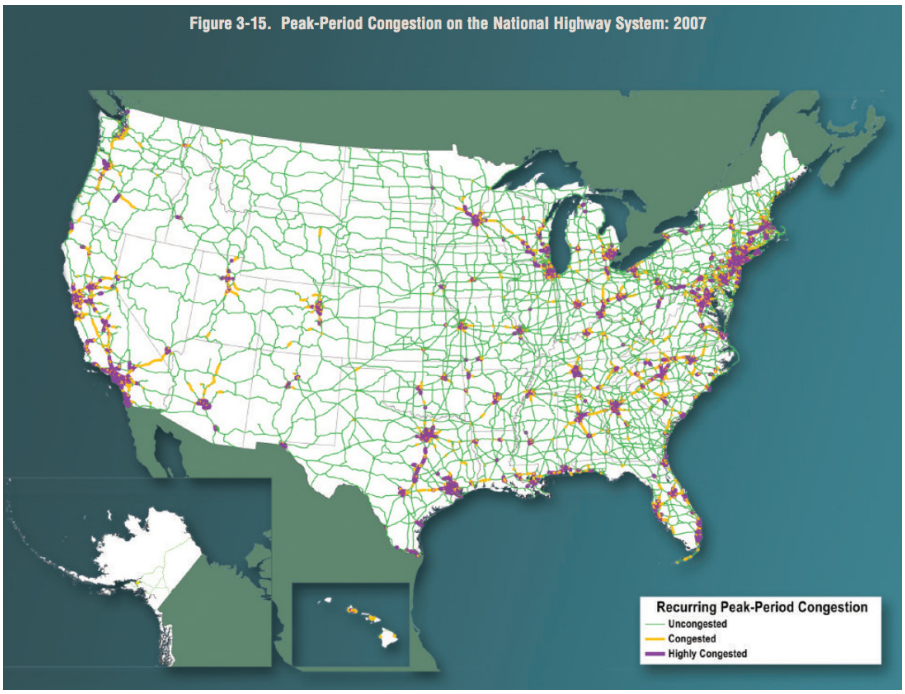
FHA

For comparison, here's what congestion looked like in 2007:



FHA

If nothing is done to improve the situation, areas of "recurring peak-period congestion" — what you currently experience driving Washington's Beltway, the New Jersey Turnpike, all of Atlanta, etc. during rush hour — will expand to 37% of the National Highway System by 2040 from 11% in 2007.

As a result, 45,000 miles of the National Highway System will become "stop-and-go," and an additional 20,000 miles will become "slow."

It's not clear whether the FHA has taken into account data showing passenger driving in the US has actually been on the wane.

But the FHA released nearly identical projects in 2008 (this is actually what Zumbrun linked to), so it's clear this is a major blind spot for the government.

NHTSA Hopes to Cut Teen Fatality Rate in Crashes with New Safety Campaign

The National Highway Traffic Safety Administration last week launched a safety campaign, "5 to Drive," aimed at reducing the number of teens killed in vehicle crashes. Data from NHTSA shows that vehicle crashes are the number one cause of death for those aged 14-18.

NHTSA's campaign encourages parents of teens to discuss five major rules with their kids: No cell phone use or texting while driving; no extra passengers; no speeding; no alcohol; and no driving or riding without a seat belt. These points were identified by NHTSA as most important due to several statistics from 2011, including:

•More than half of the teen occupants of vehicles who died in crashes in were not wearing seat belts.

•Speed was a factor in 35 percent of teen driver crashes that resulted in a fatality.

•12 percent of teen drivers involved in fatal crashes were "distracted" at the time.

•More than 500 people died in crashes in which drivers between 14-18 years of age had alcohol in their systems.

"Inexperience and immaturity, combined with speed, drinking and driving, not wearing seat belts, distracted driving, and other teen passengers contribute to the high fatality rate of teens involved in fatal crashes," said NHTSA Administrator David Strickland in a statement. "I encourage all parents of teenagers to have an open discussion with their teen about the dangers common among young drivers and to make sure they use our '5 to Drive' program to develop the necessary skills to drive safely every trip, every time."

Congratulations!

Nancy Maricondi, Executive Director of PRARA (Petroleum Retailers & Auto Repair Association, Pittsburgh, PA) has a brand new granddaughter - meet **Olivia Nicole**.

Olivia weighed 6 pounds, 1 ounce and was 21.56 inches long. She spent 9 days in the NIC Unit but is home now and doing fine.

Congratulations to Nancy and family, on the birth of their very beautiful granddaughter! Your SSDA-AT family knows you will have a wonderful holiday season being a grandmother to this beautiful bundle of joy!

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- Section 2707 (relating to comprehensive health insurance coverage);
- Section 2709, as codified at 42 U.S.C. § 300gg-8 (relating to coverage for individuals participating in approved clinical trials).

The specified conditions are the following:

- The coverage was in effect on October 1, 2013;
- The health insurance issuer sends a notice to all individuals and small businesses that received a cancellation or termination notice with respect to the coverage, or sends a notice to all individuals and small businesses that would otherwise receive a cancellation or termination notice with respect to the coverage, that informs them of
  1) any changes in the options that are available to them;
  2) which of the specified market reforms would not be reflected in any coverage that continues;
  3) their potential right to enroll in a qualified health plan offered through a Health Insurance Marketplace and possibly qualify for financial assistance;
  4) how to access such coverage through a Marketplace; and
  5) their right to enroll in health insurance coverage outside of a Marketplace that complies with the specified market reforms.

  Where individuals or small businesses have already received a cancellation or termination notice, the issuer must send this notice as soon as reasonably possible. Where individuals or small business would otherwise receive a cancellation or termination notice, the issuer must send this notice by the time that it would otherwise send the cancellation or termination notice."

Here's how it will be implemented:

"State agencies responsible for enforcing the specified market reforms are encouraged to adopt the same transitional policy with respect to this coverage." Sincerely, Gary Cohen, Director Center for Consumer Information and Insurance Oversight."

The holders of such policies would not be eligible for the federal subsidies that are available only for insurance obtained through the exchange.

Note this transition policy applies to small group market plans as well.

H.R. 3550

The House of Representatives has passed legislation, H.R 3550 to permit insurers to offer through 2014 the type of policies that were cancelled because they did not provide the minimum essential benefit coverage. Unlike the administrative "action," the bill "stays" the applicable portions of PPACA. The "wrinkle" is that the bill permits the "sale" of these policies, which means that the insurers could sell new policies for 2014, not just renew those they had cancelled. The holders of such policies would not be eligible for the federal subsidies that are available only for insurance obtained through the exchange.

The bill in its entirety:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. Short title.

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This Act may be cited as the "Keep Your Health Plan Act of 2013."

SEC. 2. If you like your health care plan, you can keep it.

(a) In general.—Notwithstanding any provision of the Patient Protection and Affordable Care Act (including any amendment made by such Act or by the Health Care and Education Reconciliation Act of 2010), a health insurance issuer that has in effect health insurance coverage in the individual market as of January 1, 2013, may continue after such date to offer such coverage for sale during 2014 in such market outside of an Exchange established under section 1311 or 1321 of such Act (42 U.S.C. 18031, 18041).

(b) Treatment as grandfathered health plan in satisfaction of minimum essential coverage.—Health insurance coverage described in subsection (a) shall be treated as a grandfathered health plan for purposes of the amendment made by section 1501(b) of the Patient Protection and Affordable Care Act.

It appears this would apply to the individual market only not small group plans.

In the Senate, Senator Mary Landrieu (D-LA) has legislation, S. 1642, that "stays" the applicable parts of PPACA related to the minimum essential benefits. It applies to only those insureds that had policies in place this year but it allows the insureds to keep them indefinitely if the insurer continues to offer the plans. The holders of such policies would not be eligible for the federal subsidies that are available only for insurance obtained through the exchange.

The key section of the bill:

"Notwithstanding any other provision of law, an individual may elect to continue enrollment under the health insurance coverage (offered in the individual market) in which such individual was enrolled on December 31, 2013, if such individual meets such other eligibility requirements (such as payment of premiums) as are applied with respect to such coverage, unless such issuer cancels all coverage offered in such market and ceases operations as a health insurance issuer. Any such coverage shall be deemed to be a grandfathered health plan for purposes of the Patient Protection and Affordable Care Act (or an amendment made by that Act). Coverage to which this section applies shall be deemed to be minimum essential coverage for purposes of section 5000A of the Internal Revenue Code of 1986."

There is a "transparency requirement" that a health insurance issuer that offers health insurance coverage in the individual market shall annually, at the time of enrollment and renewal, provide enrollees with a notice that states, if applicable, the reasons that such coverage does not meet the requirements of PPACA, that the enrollee has the right to continue to enroll in such coverage; and that the enrollee has the right to enroll in a qualified health plan

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offered through an Exchange and instruction on how to access such Exchange.

It appears this would apply to the individual market only not small group plans.

WOTC EXTENSION MAY BE ATTACHED TO MINIMUM WAGE BILL

Senate Democrats are planning to move a bill soon to raise the minimum wage to $9 an hour and index it for inflation. With new Senator Cory Booker on board, Majority Leader Harry Reid needs but five Republicans to make the 60 votes needed to limit debate and pass the bill.

The plan is for WOTC and other business tax breaks to be included with minimum wage to make the bill acceptable by offsetting some of the cost of the wage hike. This is the same path the Senate took in 2007 when the last minimum wage increase was enacted and WOTC received a four-year extension.

In 2007, there was strong support in both Houses for a minimum wage increase, and the bill was headed for passage. After consulting with WOTC Coalition members, those opposed to a minimum wage increase agreed the Coalition should support the bill which was bound to become law anyway.

The situation is different today – if such a bill were to pass the Senate, it may not even get a vote in the House, as most Republicans believe today's high unemployment isn't a good time to be increasing the cost of a job. On the other hand, a minimum wage increase has long been popular with the public, so there'll be pressure on Republicans to pass a compromise going into an election year.

Key people calling the shots are Senator Harry Reid, Finance Committee Chairman Max Baucus, and Democratic Policy Committee Chairman Charles Schumer. Minority Leader Mitch McConnell and Finance Committee members, Democrat or Republican, are also the right contacts at this point. We think there's a solid case to be made for keeping a minimum wage bill, which is likely to be held up for weeks in the House, separate from a bill that's urgently needed to renew important programs expiring on December 31st, such as the Medicare doctors' fix, permanent WOTC, and other expiring provisions.

BUDGET NEGOTIATIONS

On November 11, negotiators from the Democratic staff of the Senate Budget Committee prepared a document outlining "top tax loopholes" that they argue should be a part of the discussion in any budget agreement (the document is attached to this newsletter). There are 12 "loopholes" identified in the document, but we wanted to flag the last one, as it pertains to the estate tax.

"Close Estate Tax Loopholes for the Wealthiest Americans – Millionaires and their heirs can skirt the estate tax through a form-over-substance scheme that involves setting up a two-year grantor retained annuity trust (GRAT). If the grantor outlives the trust term of two years, the trust assets

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avoid estate taxation. Closing this loophole, by requiring a ten-year minimum term for grantor trusts, would save more than $3 billion over ten years."

This appears to mirror the proposal on GRATs that was included in the President's budget earlier this year. As a reminder, GRATs are useful in estate tax planning because of their ability to transfer assets to heirs without incurring estate of gift tax liability. For more information about GRATs, below is a passage from a memo authored by NFIB's own Chris Whitcomb to the coalition last year.

At this time, we do not anticipate that the budget negotiations will yield any changes in revenue. Chairman Ryan has stated that he does not believe Congress should be trading spending cuts (in the form of sequestration) with tax increases. However, we wanted to alert the coalition to the fact that a) there is a list, and b) the estate tax is on it. We will keep you updated to any changes in the negotiations, should the estate tax become a part of the discussion. Let us know if you have any questions.

Grantor Trusts

Grantor trusts are frequently used by high net worth family businesses and farms, especially when they have a lot of illiquid assets that exceed the lifetime gift exemption. In that situation, the older generation uses this type of trust as a planning tool to minimize or eliminate estate tax liability when these assets pass to the younger generation. The "grantor" in the grantor trust is the older generation and the grantee is the younger generation and ultimate trust beneficiary. Because the grantor retains an interest in the trust property, estate, gift and generation skipping transfer tax liabilities can usually be minimized or eliminated.

Structure of Grantor Trusts

The grantor first transfers the asset into an irrevocable trust, which is a trust that may not be revoked after its creation. The grantor retains an interest in the trust for a time period anticipated to be shorter than the grantor's life expectancy, while simultaneously transferring a remainder interest in the trust property to younger beneficiaries. This interest is usually in the form of an annuity interest that guarantees a right to receive fixed annual payments for a term of years.

Alternatively, the interest can be in the form of a unitrust, which is an annual payment based on a fixed percentage of the value of the trust property. Importantly, the grantor retains use and possession of the trust property during the time period of the annuity or unitrust interest.

Due to this retained interest, the trust assets are not included in the gross estate of the trust grantor for estate tax purposes because they are owned outright at the time of the transfer by the beneficiary rather than the grantor. Further, the transfer usually avoids gift tax consequences through effective structuring of the annuity or unitrust payments. This is the case because gift taxes are calculated based on the value of the property less the actuarial value of the retained interest.

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After the grantor's annuity or unitrust interest has expired, the trust property becomes entirely vested in the beneficiary. Because the grantor does not retain any rights, the property should not be included in the grantor's gross estate. This is the case even if there is a significant increase in the value of the trust assets. In effect, the asset's values are frozen at the time the trust was created.

ADVOCACY REPORT MEASURES THE SMALL BUSINESS BENEFIT OF FEDERAL TAX EXPENDITURES

A report published November 12 by the Office of Advocacy measures the small business benefit of federal tax expenditures.

Tax expenditures are provisions in the tax law designed to benefit specific groups of taxpayers. They are similar to spending programs but generally do not involve direct federal outlays. Rather, they work through the income tax system, taking the form of special credits, exemptions, deductions, exclu-sions, and preferential rates. This study estimates the utilization of federal tax expenditure provisions by small and large businesses in 2013.

The report, Measuring the Benefit of Federal Tax Expenditures Used by Small Business, was written by John O'Hare, Mary Schmitt, Judy Xanthopoulos of Quantria Strategies, LLC.

For the full report or summary, visit www.sba.gov/advocacy/7540/756313.

WHERE NOT TO DIES IN 2014: THE CHANGING WEALTH TAX LANDSCAPE

Despite the new generous federal estate tax law, there's reason to worry about estate taxes. There are 19 states and the District of Columbia that impose separate state levies. And just because you live in a no-estate-tax state now, don't get complacent. What if you move in your old age to the estate-tax-happy Northeast to be closer to your family? Or what if your state gets revenue-hungry like Illinois which reinstated its estate tax in 2011, Delaware which made a "temporary" estate tax permanent this summer, or Minnesota that recently tweaked its law to disallow common ways folks now get around estate taxes?

The crazy, changing patchwork of state death tax laws has led to a new subspecialty of estate planning–"domicile planning"–not to sidestep income taxes but estate taxes. "It's picking a state where you die," says Charles Bender, an estate lawyer with Fox Rothschild in Warrington, Pa. who spends a lot of his time getting Pennsylvania and New Jersey clients "down to Florida." Florida has no income tax and no state death taxes.

Here's the big picture. The federal estate tax exemption of $5 million per person, indexed for inflation, is now permanent. So for 2014, up to $5.34 million of an individual's estate will be exempt from federal estate tax, with a 40% tax rate applied to any excess over the exemption amount. By contrast, states with estate taxes typically exempt far less per estate from their tax and impose a top rate of 16%.

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As in the federal system, bequests to a spouse are tax-free.

New York, for example, sets its exemption at $1 million. So the estate of a person dying in 2014 in New York with $5.34 million would owe no federal tax, but would owe New York $431,600, calculates Donald Hamburg, an estate lawyer with Golenbock Eisenman in New York City.

Six states levy only an inheritance tax, with the rate depending on the relationship of the heir to the deceased and the taxes kicking in, in some cases, on the first dollar of bequest. Two states, Maryland and New Jersey, impose both.

New Jersey, for example, imposes an estate tax between 4.2% and 16% on estates above $675,000, and an inheritance tax of between 11% and 16% on assets left to a sibling, nephew, niece or friend, but no inheritance tax on money left to parents, children or grandchildren. (Any estate tax owed is reduced by the inheritance tax paid.)

Death tax foes have been making progress on killing the taxes off or at least weakening them. In the last four years, Indiana, Kansas, North Carolina, Ohio and Oklahoma have all repealed their state death taxes, and Tennessee's is on its way out by Jan. 1, 2016. The estate tax exemption in Tennessee is $2 million for 2014, up from $1.25 million this year, and set at $4 million for 2015. Illinois doubled the amount exempt from its tax from $2 million to $4 million effective this year. Next year, Washington State's $2 million exemption amount will be indexed for inflation like Rhode Island's $910,725.

The anti-tax players are already making plans to push for repeal in several states in 2014, and speed up repeal in Tennessee, says Palmer Schoening, executive director of the Family Business Coalition in Washington, D.C. (Tennessee could follow Indiana's lead; Indiana's inheritance tax was scheduled to gradually phase out, leading to repeal on Jan. 1, 2022, but the state legislature pushed up repeal to be effective Jan. 1, 2013.)

The action is expected to take place in Republican strongholds where governors are intent on tax reform: in Maine–where the estate tax exemption amount was raised from $1 million to $2 million this year; in Nebraska—where it's seen as an issue for farmers; in Pennsylvania where state legislators carved out an exception to the inheritance tax for family farms last year, and an exception for family businesses this year. "The next step is, 'Let's get rid of it,'" Schoening says. That's the rallying cry, but in Pennsylvania, for example, there's $800 million in annual revenue at stake.

It used to be that spouses paid Pennsylvania inheritance tax at a 6% rate; that was cut to 3% in 1994, then to zero in 1995. Still 4.5% of an estate there going to children, grandchildren, parents or grandparents goes to the state; it gets more expensive, 12%, if your beneficiary is your brother or sister; and for all other beneficiaries—like a nephew or niece–it's 15%. "It really becomes significant, especially when you consider that there is no exemption, so the first dollar of the estate is subject to tax," says Bender.

The new family business exception creates opportunities for significant tax planning. "While it was in-

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tended for small mom and pop businesses, there's a gaping hole in the law that you could drive a really big business through," he says. This is because the law uses net book value to determine whether a business falls under the $5 million threshold for the exemption to apply, rather than fair market value, which is used to calculate the tax. So a child could inherit a business worth millions of dollars without paying any inheritance tax, while a niece whose aunt leaves her a $100,000 row house in Philadelphia is stuck with a $15,000 inheritance tax bill.

So what about Florida? For income tax purposes most states use a 183 day rule—if you're in the state for 183 days, you're taxed as a resident. But for estate taxes, the rule for residence is one of subjective intent—what state did you consider to be your home at the time of your death, says Bender. So if you're domiciled in Florida but come back to New Jersey for medical treatment and die in the hospital, that doesn't mean you're subject to the New Jersey's death levies.

In one case, Bender had a client in a nursing home in Florida who suffered from Alzheimer's and her children moved her to a nursing home in New Jersey where they lived. Because domicile is based on subjective intent and she didn't have the mental capacity to decide to change her domicile, her executor was able to claim that she was still a Florida resident when she died several years later.

The death certificate will be issued by the state where the death occurs. In the example above, it was necessary to make sure the death certificate reflected the woman's state of residence was Florida, even though she died in New Jersey.

GENERAL COUNSEL CORNER

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stations, Mr. Mamo can "set the wholesale prices paid for Exxon-branded gasoline in D.C., depriving D.C. residents and others ... of the benefits of competition in the wholesale supply of Exxon-branded gasoline."

The defendants have raised preliminary objections to the Attorney General's suit, filing motions to dismiss that have not yet been resolved. If the Attorney General clears that hurdle, however, the issue of the enforceability of the D.C. statute may yet be finally resolved. Hopefully, the Attorney General's suit will not drag on as long, nor end as indecisively, as the *Kazemzadeh* litigation.

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