



OCTOBER 2009

Top Legislative Issues

Federal/State Stimulus Projects – Funding Breakdown

For your information, one stimulus funding website, www.recovery.gov, breaks down the stimulus monies into various maps and tables: investments by state, investments by recipient, investments by agency, estimated job effects, and state recovery sites. For an update on the stimulus money available and committed within each state, see the attached table or visit FCA online for the latest statewide funding information, www.finishingcontractors.org.

Health Care Reform - Senate Finance Bill Has Weak Employer Mandate Requirement

Senate Finance Committee Legislation: This Committee's initial health care reform bill would require individuals to get health insurance coverage, establish a health care exchange supermarket, reform the private insurance system, expand Medicaid to those earning up to 133 percent of the federal poverty level, and establish state-based cooperatives to compete with private health plans. The proposal's cost, approximately \$900 billion over 10 years, would be completely paid for through nearly \$410 billion in Medicare and Medicaid spending reductions over 10 years, a tax on insurers offering high-end insurance plans, new fees on certain providers (e.g., device makers), and other revenue provisions.

Unfortunately, it does not mandate employers to provide health care insurance—a mandate that the FCA, along with its Campaign for Quality Construction (CQC) Alliance members, fully support. Beginning in 2013, however, employers with more than 50 workers who do not offer coverage will have to reimburse the government for each full-time employee receiving a health care affordability tax credit. This assessment would be based on the amount of the tax credit and capped at an amount equal to \$400 multiplied by the total number of employees working at the company. (NOTE: The CQC Alliance and the Building and Construction Trades Department (BCTD), AFL-CIO, have been trying to strengthen the employer mandate in all proposed health care bills; while the Associated Builders and Contractors (ABC), the Associated General Contractors of America (AGC), and the Chamber of Commerce oppose strict employer mandates.)

To allay concerns of some Democrats, along with an attempt to gain bipartisan support, the following changes to the proposed bill have already been made during a week-long markup: (1) creating a new, permanent physician payment system, instead of merely a one-year fix; (2) making health care coverage more affordable for low- and middle-income families; (3) reducing the penalties for individuals failing to get coverage; (4) providing help for states that experience significant increases in Medicaid enrollment due to the size of their current programs and/or their current rates of unemployment (e.g., they would receive full federal funding for newly eligible Medicaid beneficiaries for five years); (5) increasing the amount that low- and middle-income Americans would get through the Health Care Affordability Tax Credit; and (6) making numerous adjustments and changes to Medicare. In addition, Democrats and Republicans have filed 564 amendments to improve the proposal. Recently, liberal Democrats failed twice to inject a government-run insurance option into the legislation, despite bipartisan agreement that private insurers must change their ways. Senator Baucus who introduced the legislation has commented that he has enough votes to pass it through the Senate.

Senate Health, Education, Labor, and Pensions Committee Legislation: In contrast to the Senate Finance Committee's proposal, this Committee's health care reform bill contains an employer mandate: employers with more than 25 employees would be required to provide coverage and pay at least 60 percent of the premium or face a penalty of \$750 per uncovered full-time employee and \$350 for each uncovered part-time employee. (NOTE: More than 90 percent of the construction industry is made up of businesses that are under 20 employees which would exempt most small businesses.)

House Health Reform Legislation (H.R.3200: America's Affordable Health Choices Act of 2009): The House's legislation also requires employers to provide coverage that meets certain benefit standards and to pay for 72.5 percent

of individual premium costs and 65 percent of family premium costs. Under this bill, if employers fail to provide adequate, affordable coverage, they would face a sliding scale penalty of as much as 8 percent of their payroll, based on their annual payroll.

House Energy and Commerce Committee Legislation: Another proposed bill includes an exemption from the employer mandate for businesses with payrolls under \$500,000. This threshold was originally \$250,000, but it was raised to \$500,000 to appease the committee's "Blue Dog" Democrats. (NOTE: The \$500,000 threshold would exempt almost 85 percent of the construction industry, including 87 percent of building contractors and 84 percent of specialty contractors.)

It is expected that the Senate will soon bring their Finance Committee's proposal to the floor for discussion, and that the Senate will take the lead before the House acts on its proposal. (NOTE: President Obama favors a significant small business exemption in the final bill, along with a federal government-run option.)

GAO Report Says Worker Misclassification is a Significant Problem

The practice itself is often linked with labor and tax law violations—one reason singled out for Congresses' three percent withholding tax; in FY 2007, for example, states uncovered at least 150,000 workers who were misclassified as independent contractors. These workers all too often do not pay taxes, do not receive protections and benefits to which they are entitled, and their employers fail to pay taxes that they would otherwise pay. Unfortunately, DOL agencies do not share information internally on misclassification, and not all states share information on misclassification with the DOL, so such misclassifications often go unaddressed.

Multiemployer Pension Plans

Recent economic conditions, the use of defined contribution plans as primary retirement plans, and an aging workforce have exposed significant challenges within the current retirement system. For certain, there is no magic wand that anyone can waive to solve the multiemployer pension funds' underfunded status. Many brain trusts have been burning the midnight oils to produce short- and long-term solutions to the funding problems, but even the experts cannot agree.

For example, at a recent DOL ERISA Advisory Council meeting, two speakers addressed the adequacy and structure of the retirement system. Michael J. Sullivan, General President of the Sheet Metal Workers, advocated a complete system overhaul, stating that our current band-aid approaches are not working. He supports a new policy and legislative framework to address retirement security. On the other hand, Anna M. Rappaport, a Retirement Security Consultant, suggested we build on the current system. She supports the development of a "national retirement" policy to balance tax and labor policy and the impact of these policies on both employers (plan sponsors) and plan participants, with the DOL taking a leadership role in improving the current structure. To date, ideas abound; unfortunately, no permanent, guaranteed fixes have yet emerged.

IRS Grants Sponsors Opportunity to Revoke Elections to Freeze

The IRS issued Revenue Procedure 2009-43, a procedure that permits multiemployer plan sponsors to revoke the funding status elections they made after the financial markets collapsed and pension assets lost value in 2008. Section 204(a)(1) of the Worker, Retiree, and Employer Recovery Act of 2008 permitted sponsors to freeze their plans' funding status and temporarily delay mandatory plan funding improvements under tax code Section 432 rules for multiemployer plans in endangered or critical status. More than two-thirds (68 percent) of calendar year multiemployer plans with funding problems severe enough to warrant their being in critical status, the red zone, took advantage of the status freeze to help their plans stay out of the red zone in 2009.

Under Rev. Proc. 2009-43, the IRS has listed the conditions under which they would automatically approve plan sponsors' requests to revoke prior decisions to freeze their funded status. According to the ruling, even freeze decisions made in arbitration can receive automatic IRS approval provided that:

- the request for election revocation is submitted to the IRS by the deadline for adopting a funding improvement plan, rehabilitation plan, or update, whichever is applicable for the election year after taking the revocation into account;

- the revocation request is submitted 30 days after resolving arbitration, or by the deadline for adopting a funding improvement plan, or update, whichever date is later;
- notification under Section 432(b)(3)(D) of a plan's actual certified status for the election year is given NLT 30 days after the revocation request is submitted, and the notice explains that the election was revoked along with the revocation consequences; and
- plan sponsors whose elections did not involve arbitration comply with requirements under Section 432(d)(1)(A) and (B) or Section 432 (f)(4), as applicable, during the plan's funding plan adoption period or rehabilitation plan adoption period, to be determined as though a Section 204 election had never been made.

DOL Proposes Rule on Civil Penalties for Underfunded Plans

The DOL's Employee Benefits Security Administration issued a proposed regulation (RIN 1210-AB31) that would establish procedures for assessing civil penalties against multiemployer plan sponsors for failures related to mandatory funding improvement and rehabilitation plans. These penalties under ERISA Section 502(c)(8), as much as \$1,100/day for each violation of ERISA Section 305, would be assessed against a plan's Board of Trustees. The regulation would be effective for plan years beginning on or after January 1, 2008. **The DOL is looking for comments from Plan Administrators before November 3, 2009.**

Employee Free Choice Act (EFCA)

Senator Arlen Specter (D-PA) says that a group of senators (i.e., Senators Tom Harkin, Sherrod Brown, Thomas Carper, Charles Schumer, and Mark Pryor) reached a compromise proposal on the EFCA legislation (**\$560**). Unfortunately, the compromise does not include card check recognition, but the senator quickly commented that the compromise would most likely satisfy labor because it does include quick certification of elections, tough penalties for employers who break the law (e.g., triple back pay to employees illegally fired for trying to form a union), and last, best-offer binding arbitration. Senator Specter also pointed out that at this time he felt it would not be possible to pass EFCA without a secret ballot election, but emphasized that such elections would be held promptly. The senatorial group feels that this proposal will bring the 60 votes required for cloture, thereby moving the bill for consideration on the Senate floor later this year. The AFL-CIO, however, is of the opinion that the compromise proposal has not been finalized, the bill is still a "moving target," and they still want the "card check authorization."

DHS Preparing for Possible Immigration Overhaul

The Department of Homeland Security's Citizenship and Immigration Services (CIS) said it is preparing for the possibility that, in late 2009/early 2010, Congress may pass comprehensive immigration legislation and make E-Verify, the federal government's electronic employment verification program, mandatory for all employers. In addition, the CIS is evaluating options like biometric identifiers (e.g., fingerprints) in the E-Verify program. Preparation includes evaluating the technical infrastructure of the program so that it can support the number of queries that would result from mandated use, as well as continuing to reduce the program's error rate.

House Begins Preparations for Immigration

Rep. Luis Gutierrez (D-IL), a member of the House Judiciary Committee's Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, plans to introduce a compassionate and comprehensive immigration bill outline in October—one that keeps families together, protects workers, and allows a pathway to legalized citizenship. An experienced, comprehensive immigration reform legislator, in 2007 he introduced H.R.1645: the Security through Regularized Immigration and a Vibrant Economy Act (called the STRIVE Act) which garnered 79 cosponsors, but it never came to a floor vote.

HUD to Remove Bush Administration Rules Restricting the Use of PLAs

A final rule was published to remove previous regulations that prohibited mandates requiring the use of Project Labor Agreements (PLAs) in HUD-assisted construction contracts, effective September 28. This rule implements President Obama's E.O. 13502, "Use of PLAs for Federal Construction Projects." The E.O. neither requires agencies to use the agreements nor precludes their use; however, it does encourage federal departments/agencies on a project-by-project basis to consider using PLAs for federal construction projects that total more than \$25 million. After all, using PLAs allows federal agencies to take advantage of all available tools for ensuring that projects are built on time and within budget.

Top Regulatory Issues

OSHA Responds to Industry's Challenge: Per-Person Penalty Rule Change

The DOL and OSHA filed a joint reply in a major case challenging whether OSHA, after determining an employer has violated safety regulations regarding personal protective equipment or safety training, may set penalties based on the number of employees affected by the violation. DOL and OSHA argue that the industry petitioners are incorrect with their argument that Congress did not grant OSHA that power. Their brief says that OSHA has had the power since 1990 to issue "per-instance" citations to employers that have shown bad faith in following the mandated safety rules under the OSH Act. They further argue that the Congress granted the Secretary of Labor the authority to issue such legislative rules, thereby delegating to her the authority to set the per-person penalties. Stay tuned—there is more to come with both sides presenting their oral arguments in November 2009.

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Investments By State

(dollar amounts are in thousands)

State/Territories	Announced	Made Available	Paid Out
Alabama	\$3,337,848.19	\$2,497,445.63	\$690,383.65
Alaska	\$1,522,152.75	\$811,658.98	\$150,297.78
American Samoa	\$67,797.80	\$36,492.64	\$2,890.36
Arizona	\$5,241,604.35	\$3,543,153.29	\$1,536,334.38
Arkansas	\$2,183,674.99	\$1,517,732.69	\$513,018.40
California	\$26,102,197.88	\$19,798,365.57	\$11,992,789.36
Colorado	\$3,604,910.84	\$2,318,373.84	\$808,926.30
Connecticut	\$2,634,378.05	\$2,141,836.47	\$873,380.48
Delaware	\$816,650.05	\$560,859.83	\$187,256.44
District of Columbia	\$2,331,218.19	\$2,208,667.11	\$328,211.02
Federated States of Micronesia	\$5,116.63	\$4,731.63	\$1,849.54
Florida	\$11,318,474.92	\$8,632,422.87	\$3,177,653.96
Georgia	\$6,492,707.19	\$4,816,349.09	\$1,925,128.16
Guam	\$182,612.33	\$78,082.18	\$14,794.06
Hawaii	\$1,389,487.73	\$754,035.84	\$249,055.65
Idaho	\$1,667,852.82	\$810,886.04	\$259,496.04
Illinois	\$10,372,286.96	\$7,223,295.67	\$3,971,335.74
Indiana	\$4,630,224.05	\$3,530,862.25	\$1,687,828.07
Iowa	\$2,244,381.36	\$1,796,449.18	\$639,626.71
Kansas	\$2,060,849.00	\$1,366,929.18	\$405,650.23
Kentucky	\$3,181,471.60	\$2,211,123.46	\$742,101.70
Louisiana	\$3,361,590.93	\$2,367,746.86	\$627,376.95
Maine	\$1,234,082.92	\$924,526.82	\$378,982.25
Marshall Islands	\$2,989.34	\$2,774.34	\$801.12
Maryland	\$4,085,709.39	\$2,870,833.02	\$891,419.27
Massachusetts	\$5,571,425.77	\$4,670,336.65	\$2,170,277.47
Michigan	\$7,223,870.28	\$5,706,960.98	\$2,908,857.13
Minnesota	\$3,853,563.09	\$3,094,717.49	\$1,270,791.02
Mississippi	\$2,443,353.89	\$1,718,376.79	\$507,369.95
Missouri	\$4,436,025.53	\$3,178,946.55	\$1,002,456.58
Montana	\$1,178,763.93	\$636,232.60	\$139,027.66
Nebraska	\$1,313,622.88	\$864,345.36	\$177,589.91
Nevada	\$1,644,096.39	\$1,079,786.73	\$529,674.49
New Hampshire	\$1,355,011.33	\$709,110.79	\$141,054.97
New Jersey	\$5,424,873.97	\$4,705,255.25	\$2,203,049.83
New Mexico	\$2,440,679.03	\$1,194,625.57	\$221,756.42
New York	\$18,026,604.07	\$14,215,742.53	\$6,039,999.82
North Carolina	\$6,002,093.37	\$4,341,931.21	\$2,087,662.06
North Dakota	\$805,661.99	\$466,316.96	\$80,098.05
Northern Mariana Islands	\$53,045.51	\$26,579.92	\$331.75
Ohio	\$8,065,892.74	\$5,989,256.67	\$2,211,080.35
Oklahoma	\$2,840,623.49	\$2,087,035.21	\$739,724.29
Oregon	\$2,884,391.24	\$2,148,243.95	\$972,961.63
Palau	\$2,105.17	\$2,164.46	\$781.01
Pennsylvania	\$8,757,207.99	\$5,275,071.68	\$2,375,323.40

State/Territories	Announced	Made Available	Paid Out
Puerto Rico	\$3,398,964.52	\$2,401,449.65	\$518,930.73
Rhode Island	\$1,023,440.18	\$863,402.76	\$375,712.95
South Carolina	\$4,749,313.40	\$2,248,271.28	\$759,978.22
South Dakota	\$997,287.79	\$563,030.89	\$159,668.92
Tennessee	\$5,254,851.68	\$3,458,379.16	\$1,114,257.70
Texas	\$16,687,761.20	\$10,931,879.45	\$3,333,631.63
U.S. Minor Outlying Islands	\$4,500.00	\$0.00	\$0.00
U.S. Virgin Islands	\$131,966.97	\$81,494.42	\$11,582.85
Utah	\$1,929,799.92	\$1,381,503.47	\$585,879.02
Vermont	\$626,555.43	\$488,603.55	\$162,260.93
Virginia	\$5,098,083.34	\$3,215,333.24	\$970,683.28
Washington	\$6,896,778.44	\$3,515,808.76	\$1,513,210.12
West Virginia	\$1,471,889.90	\$1,052,288.15	\$301,501.22
Wisconsin	\$3,756,108.29	\$2,760,071.12	\$1,468,015.21
Wyoming	\$632,244.62	\$426,520.98	\$76,035.10

Source: www.recovery.gov