SEYFARTH SHAW

Health Care Reform Management Alert Series

Are Reports of ObamaCare's Death Greatly Exaggerated?

Issue 113

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This is the one hundred and thirteenth issue in our series of alerts for employers on selected topics on health care reform. (Click here to access our general Summary of Health Care Reform and other issues in this series.) This series of Health Care Reform Management Alerts is designed to provide an in-depth analysis of certain aspects of health care reform and how it will impact your employer-sponsored plans.

The Republicans made a last ditch effort to repeal the Affordable Care Act (ACA) the last week of September when they floated the latest iteration of proposed legislation under the Graham-Cassidy bill. Sens. Lindsey Graham (SC) and Bill Cassidy (LA) introduced a bill that would have altered federal funding by eliminating the ACA's subsidized insurance coverage and Medicaid expansion, and instead give states fewer funds in the form of block grants. However, the September 30th deadline to pass legislation with a simple majority came and went without the bill being called for a vote after too many Republican senators came out against it.

That left many wondering if the health care reform efforts were dead with the attention of Congress turning to the long-promised tax reform. However, the Trump administration has been fairly active in doing what it can to cut back on the ACA, with rule changes and executive orders that change the ACA landscape.

Contraceptive Mandate

The ACA mandates that health plans cover contraceptive care at 100% as a preventive service. Religious employers, non-profits with religious affiliations and certain closely-held corporations with sincerely held religious beliefs can opt-out of the coverage mandate. Click here to see our Alert on this topic. However, up until now, most for profit employers had to comply.

On October 6th, the Departments of Health and Human Services, Treasury, and Labor issued interim final rules that significantly broaden the scope of employers who can claim an exemption to the contraceptive mandate. Interestingly, the agencies skipped over the step of providing "proposed" rules, which would be subject to public comment, and went right to issuing interim final rules. (The government equivalent to the breach of etiquette created by skipping the triple dare and going right to the triple-dog dare.)

The interim final rules now expand the types of employers who can claim an exemption from the contraceptive mandate to include other non-profits as well as for profit companies, including publicly-traded companies and institutions of higher learning who have either sincerely-held religious beliefs or a moral conviction (not based in any particular religious belief).

The agencies noted that other preventive services are not impacted by the new rules, and emphasized their belief that only 200 entities (who filed lawsuits challenging the contraceptive mandate) will be impacted. Therefore, they conclude that 99.9% of women will not lose their contraceptive coverage as a result of the new rules.

Almost immediately several lawsuits were filed challenging the new rules and alleging violations of the First Amendment by favoring certain religious views, discrimination against women, and issuance without following proper government procedures.

Health Insurance Rules

On October 12, 2017, President Trump signed an Executive Order directing regulatory agencies to rewrite rules in several areas of health care previously regulated by the ACA. The nature and scope of these intended changes will not be clear until the agencies issue such guidance (which is expected within 60–120 days), but they appear to direct the agencies to create greater flexibility primarily in the individual and small group insurance market. Specifically the Executive Order addresses three areas:

Association Health Plans

Background: Many of the ACA's reforms only impacted insured policies in the individual and small group markets (typically, the small group market includes employers with under 50 employees). These regulations, including community rating standards (requiring healthier populations to pay more to subsidize sicker populations), and the essential health benefits mandate (requiring all policies to cover certain core benefits) drove up the cost of insurance in what was previously an under-regulated market in many states. It also created a disconnect between small group policies, on one hand, and large group policies and self-funded plans, on the other, that were exempt from these standards and had more flexibility in plan design.

Executive Order Response: The Executive Order directs the regulatory agencies to interpret ERISA more broadly to permit individuals and small employers to band together to form Association Health Plans (AHPs). While the executive order contained few details, we presume that regulatory guidance will address a few key elements:

- Current federal guidelines impose restrictions and reporting obligations on risk-pooling for unrelated employers and individuals (Multiple Employer Welfare Arrangements, or "MEWAs"). Notably, ERISA does not exempt MEWAs from state insurance regulations and many states prohibit MEWAs or more heavily regulate their activity. Presumably, regulatory guidance will create an opportunity for employers or individuals in a bona fide association to pool their risk in an insured (and potentially self-funded) arrangement while maintaining preemption from state insurance regulation.
- It also appears the order would exempt these AHPs from insurance mandates that otherwise apply in the small group market, including the community rating and essential health benefit mandates.
- Finally, the Executive Order suggests the agencies will permit employers to "join together across State lines to offer coverage." It's unclear whether this directive is intended to simply permit unrelated employers in multiple different states to form a self-insured collective risk pool or to actually influence state insurance regulations that typically attach on a state-by-state basis.

Short-Term Limited Duration Health Insurance

Background: ACA regulations had significantly limited the exemption allowing short-term, limited-duration health plans to avoid many ACA mandates (e.g., prohibition on dollar limits and preventive services mandate). The exemption was intended to provide greater flexibility for these types of policies, which generally served to bridge gaps between health insurance enrollments, such as when transitioning from one job to another. But regulators had become concerned that these policies were being marketed and used as long-term health insurance solutions (only without the otherwise applicable ACA protections). See Issue 100 in our alert series for more information on ACA rules relating to these benefits.

Executive Order Response: The Executive Order directs agencies to consider expanding coverage under these short-term insurance policies. It's unclear exactly how the agencies would interpret this directive, but one possibility is that the agencies could revert to pre-ACA guidelines (permitting enrollment in these policies for up to 12 months and renewal under certain circumstances).

Expanded Use of Health Reimbursement Accounts

Background: In 2013, the regulatory agencies issued guidance essentially prohibiting employers from reimbursing employees (on a pre-tax basis or otherwise) for individual insurance policies. As we described in Issue 73, the agencies viewed these stand-alone health reimbursement arrangements (HRAs) as health plans that contain prohibited annual dollar limits (i.e., the HRA balance). As we described in Issue 103, Congress later created a limited exemption permitting use of stand-alone HRAs, but only for small employers that met certain strict requirements.

Executive Order Response: The Executive Order directs the agencies to consider changes to HRAs so employers can make better use of them for their employees. Presumably, the Administration intends to direct agencies to broaden the already applicable small employer exemption to apply to larger employers and to ease existing limits on the amount that can be reimbursed through HRAs (currently, $4,950 for self-only coverage or $10,000 for family coverage). Depending on the scope of these new guidelines, this could potentially create an opportunity for employers to offer so-called "defined contribution health plans" in which the employer provides employees with a set amount of money to be used to buy an individual insurance policy (where the employer carries no risk).

The breadth of this Executive Order leaves many unanswered questions including how far the agencies will attempt to go with these regulations and whether the Executive Order is within the scope of the Administration's executive authority. Further, this proposal has already created concern among insurance carriers and state insurance commissioners that it has the potential to dilute/sicken the insurance market risk pool and raise costs for the federal government (which subsidizes the state Marketplaces). Specifically, the AHP and short-term, limited duration guidelines could serve to lure healthier populations (with less upside risk) out of the insurance market. Further, the HRA guidelines could encourage employers with sick populations to shift those groups to the individual insurance market while limiting the employer's risk to a defined pot of money.

Cost-Sharing Subsidies

Taking further action to fulfill his promise to let ObamaCare fail, late on October 12th, President Trump finally acted on his long-standing threat to cease funding the cost-sharing subsidies on the public Marketplaces. While the ACA had directed these payments, it relied on Congress to appropriate the monies. When Democrats lost control of Congress during the Obama Administration, the Republican led Congress declined to allocate the funding, leaving the Obama Administration to do so through executive action. It was unclear whether the Obama Administration had the authority to do so, which was the stated basis for the Trump Administration cutting off these funds (i.e., it is the responsibility of Congress, not the President, to allocate these monies).

This action was taken in the face of both parties in Congress urging the administration to continue the payments to stabilize the markets in the near term. Insurance providers on the Marketplaces were already skittish about the continuation of the payments, which help cover the cost of those lower-income enrollees facing more costly health conditions. This was seen as a large reason for the rate hikes announced for 2018. The latest action could cause more insurers to pull out of the Marketplaces all together. Further, it's expected that some carriers will sue the Administration for the funding, which was promised (but not funded) by the ACA. More than half of the enrollees on the Marketplaces qualified for the cost-sharing payments this year, which are expected to cost about $7 billion. Further, earlier Congressional Budget Office scoring indicated it will actually cost the government significant amounts to cut the funding, because it will cause carriers to increase premiums significantly (which are subsidized by the government and for which funding has been allocated).

This latest Administration action could accelerate bipartisan discussions to allocate funding, although it comes during a busy time when Congress is attempting to move forward tax reform (with budget and debt ceilings fights looming in December).

We will continue to monitor these developments and Congressional action (if any) and keep you apprised of any further movement.

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