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LEGAL ALERT

Post-Election Returns: What Now for Obamacare?

The votes have been counted and Donald Trump is the president-elect and Republicans control Congress. Among the many questions around the proverbial watercooler is what now for “Obamacare”? While it is impossible for anyone to predict the future, we undertake to make a short, best guess about the future of the Affordable Care Act (“ACA”).

As a candidate, Mr. Trump repeatedly vowed to “repeal and replace” the ACA. So, the first question is, inevitably, will the ACA be repealed and, if so, what will replace it?

As to **repeal**, it seems unlikely that 100% of the ACA will disappear. Many of the provisions of the ACA are favored by the country’s insured (even if not necessarily all that popular with carriers). ACA insurance reforms are popular. It is unlikely that the new President would seek to alienate Americans by rolling back these favored provisions of the ACA.

For example, under the ACA group health plans are not permitted to impose lifetime limits on most benefits. Prior to the ACA, lifetime limits were standard: if a participant exceeded an established lifetime dollar limit no further benefits would be payable under the plan. Lifetime limits do not increase the cost of insurance significantly (because so few participants actually ever exceed them), and they are favored by the insured, so it is unlikely that the elimination of lifetime limits will disappear.

Similarly, annual limits on essential health benefits will likely either survive repeal or re-appear in any replacement legislation, for the same reasons that lifetime limits will survive.

Extension of dependent coverage is another popular ACA provision that is likely to survive repeal. Prior to the ACA, children of parents covered under a group health plan would “age out” of their parent’s plan when they reached age 19, unless they were

A MODEST PROPOSAL

Congress should consider increasing the age of coverage for children in group health plans to age 29 or even 30. The sluggish recovery has been particularly impactful on those younger than 30. Increasing the age at which children age-out of their parent’s group health plan to 30 would serve the dual purpose of providing low cost insurance and bringing this generally healthier group of individuals into the insurance pool.

enrolled full-time in school and met certain other requirements, such as being unmarried. The ACA requires health plans to cover children up to the age of 26, regardless of dependent status and regardless of whether they live with their parents. Given the sluggish recovery of the U.S. economy, this provision of the ACA is likely one of the biggest successes. Young adults who were unemployed or underemployed would, prior to the passage of the ACA, remain uninsured. Traditionally, the uninsured rate for young adults is approximately one-third higher than for older employed adults. The increased coverage has made it possible for millions of young adults to be insured.

TORT REFORM

Is tort reform coming? Though not a benefits issue, we note that tort reform has always been high on the Republicans' wish list for reform. Medical malpractice is believed to cause significant increases to healthcare costs, both due to direct costs of malpractice insurance premiums and indirect costs of defensive medicine. Whether tort reform occurs or reduces costs remains to be seen.

Another popular ACA provision is the guaranteed issue of health insurance. Under the ACA, group health plans have been required to eliminate all pre-existing condition exclusions. Some form of this concept will remain, but it is likely, based on the various Republican proposals that have been put forth over the last few years, that this provision may not survive in its current form. Instead, federal law may well revert to the previous portability provision in place before the ACA which would require insureds to maintain continuous coverage to avoid preexisting condition exclusions or limitations. Unlike the ACA provision, the prior law promotes responsible behavior: it encourages individuals to remain in the insurance pool even when they don't need insurance, which will help to keep insurance costs down.

Tax credits to small businesses to buy insurance, another ACA provision, may survive with some changes in the replacement legislation. Medicare reform is also likely to survive, particularly the concept of Medicaid Expansion, albeit on a revamped basis.

There are other elements of the ACA that will likely survive repeal, but some of the key ACA provisions are likely to disappear. These can be grouped broadly into the category of "mandates." As a candidate, President-elect Trump's message that there are too many mandates coming out of Washington, D.C. seemed to resonate; clearly he has been given his own mandate to reduce these directives.

The first mandate that will likely fall on the new Administration's chopping block is the "individual mandate," which penalizes individuals who do not purchase insurance. The Republican Congress and the new President are not likely to continue to support a federal law that requires U.S. citizens to purchase a product from a non-public seller. Of course, the challenge for the new Administration and Congress will be to develop programs that will entice Americans to buy insurance—assuming the White House and Congress agree that attempting to get as close to 100% of Americans insured is still a priority for any new legislation.

Another key mandate that will likely disappear is the employer "pay-or-play" mandate. This, of course, would have a "HUGE" impact on businesses in America. A significant majority of the compliance efforts underway by employers under the ACA is devoted to addressing various rules that are in place because of the pay-or-play mandate, including establishing 30 hours a week as "full-time," counting hours and developing complex methods for tracking "variable hour" employees, and, of course, completing and filing the ridiculously complex reporting forms (1094 and 1095). If the pay-or-play mandate is repealed, all this complex activity will cease, and the tens of thousands of pages of regulations implementing these rules will be consigned to the dustbin of history.

Finally, it appears that the Cadillac Tax, now scheduled to go into effect in 2020, will be eliminated.

So, what will **replacement** look like? Anyone who says he or she knows the answer to that question is fooling him/herself. President-elect Trump will likely spend considerable time between now and January 20, 2017 meeting with Senate and House leaders on both sides of the aisle and discussing the various proposals that have been advanced over the last few years. He and Congress will likely be ready in the opening days of the 115th Congress to implement either one or a series of laws that will repeal and replace the ACA. Ironically, because of Senate rules, the Republicans will likely use the same procedural loophole to pass repeal bills that the Democrats used to originally pass the law.

As a candidate, Mr. Trump focused primarily on some key issues that he believes will address the health care/insurance concerns in the U.S. Chief among his proposals is a plan to modify federal law to permit the sale of health insurance across state lines. Under current federal law the states are permitted to limit the sale of health insurance in their states. In some states this has led to only one or maybe two carriers “owning” the market. Increased competition across state lines, Mr. Trump believes, would reduce costs and lead to better products. From an employer’s perspective, it would seem that eliminating the ability of states to limit access to carriers would be helpful for single-state and multi-state employers.

Mr. Trump also called for increased use of Health Savings Accounts (HSAs). Again, improving access to and use of HSAs, and promoting consumerism by participants in group health plans would seem to be a positive development for employers, if it occurs.

When Mr. Trump talks to members of Congress on this issue he will find that there are many ideas—good and bad—that have been floated over the last few years. Key concepts that he might hear include the introduction of means-tested subsidies—not unlike the current subsidies available to purchase insurance through the Marketplace. Access will still have to be addressed, so it is likely that some elements of the current Marketplace methodology will survive.

The reality is that any change, if it includes access to affordable insurance, will be costly. How will new legislation pay for the changes? The most likely approach will be to modify the tax-preference provided to employer-provided health insurance. Many of the Republican proposals that have been put forth include either a phase out on tax-free premiums based on income levels or a phase out based on the total cost of premium. In the former, the proposals typically set a compensation limit at which the tax-free nature of insurance premiums begins to disappear. In the latter, the limit is placed on the value of the insurance, not unlike the current Cadillac Tax model, such that the tax-free premium disappears with more expensive coverage.

Under either scenario, tax dollars will be generated to pay for whatever replaces the ACA. It remains to be seen how employers will react, but it is doubtful—in our view—that employers will “get out of the business” of providing health insurance if the tax-free nature of the benefit is lost for some of its employees. Providing insurance will continue to be an important benefit. It is likely that employers will look for other benefits that might be offered—whether on a tax-free basis or not—to replace the lost tax-preference inherent in the current system.

It is impossible at this point to know what **repeal and replace** will look like. For now, we are encouraging employers to stay the course and continue to comply with current law. We can guess but we do not know what will stay and what will disappear, so it is better to continue doing what you’re doing, rather than potentially violating a law or set of rules that might remain in place.

Employers may be tempted to suspend all compliance efforts now, in anticipation of the current change. That would be a mistake. Until the rules change, employers are well advised to stay the course.



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