CLIENT ALERT

Trump Administration Expands Availability of Non-ACA Compliant Health Plans

Oct.13.2017

Administration to Immediately Stop Cost-Sharing Reduction Payments to Insurers, Asks Congress to Negotiate on Health Care Reform

Yesterday President Trump took two actions likely to undermine the stability of risk pools for ACA individual markets and simultaneously decided a lingering legal issue on how health plans are subsidized for offering insurance to people unable to afford the full cost of copays, coinsurance, and deductibles. Although complex in the details, the overall policy intent is clear: undermine the short-term functioning of the exchanges in order to press Congress back to the negotiating table.

The Executive Order

The president directed the Departments of Labor, the Treasury, and the Department of Health and Human Services to allow small businesses and individuals to obtain non-ACA compliant—and therefore, cheaper—health plans through regulatory changes. Specifically, the order seeks to expand the scope of association health plans, increase the duration of short-term, limited-duration insurance coverage, and lift certain restrictions for health reimbursement accounts (HRAs). Each of these changes will require notice and comment rulemakings and may take effect for the 2019 benefit year.

Yesterday's order builds on President Trump's Inauguration Day order that agencies, "exercise all authority and discretion available to them to waive, defer, grant exemptions from, or delay the implementation of" any provision of the ACA that imposes a financial or regulatory burden on any stakeholder including patients, health care providers, insurers, and others. The order is the latest in a series of moves designed to provide incentives for healthier people to obtain coverage outside the ACA marketplaces, following on recent reductions in funding for navigators and advertising of open enrollment for coverage on the exchanges and an abbreviated open enrollment period.

The specifics of the Executive Order

Association Health Plans (AHPs)

The Executive Order charges the Department of Labor to "consider proposing regulations or revising guidance" by December 11 (60 days from the date of the Order) "to expand access to health coverage by allowing more employers to form AHPs." It directs DOL to consider expanding ways to satisfy the commonality-of-interest requirements to establish a bona fide association, wider interpretations of the definition of "employer" under ERISA Section 3(5),[1][1] and "consider ways to promote formation of AHPs on the basis of common geography or industry." The goal is to enable more AHPs to qualify as large group plans subject to ERISA and its preemption of most state laws and prevent application of the ACA's small group rules.

Generally, under the ACA, AHPs are subject to regulation under individual market rules or small group rules, depending on whether the associations offer coverage to individuals or small groups. But where an AHP is comprised of a group of employers bound together by a commonality of interest (besides merely buying insurance)—such as how the members are solicited, pre-existing relationships between the members, the level of direct and indirect control employers have over the plan, and other factors—it is treated as a single, large group health plan under the ACA.

As a result, AHPs are not required to comply with many of the ACA mandates applicable to small-group plans. For example:

- AHPs are not required to accept any employer who applies for coverage.
- AHPs are not required to offer essential health benefits (which include preventive health services at no member cost).
- AHPs are not subject to rate review.

State insurance regulators have long viewed AHPs with skepticism. Already the NAIC has reiterated concerns that AHPs erode consumer protection and solvency requirements, areas of strong state oversight. Likewise, NAIC questions how AHPs will impact "already fragile markets."

If more AHPs are permitted to function as large-group ERISA plans, it will enable AHPs to offer less expensive coverage targeted at healthier groups. This would undermine the SHOP and exchanges by distorting the risk pool. It is not clear whether, or how, the administration could use AHPs to cover individuals given current regulations.[2][2] Similarly, the Executive Order does not address how AHPs could be sold across state lines.

Short-Term, Limited-Duration Insurance Coverage

The Executive Order directs the Secretaries of the Treasury, Labor, and the Department of Health and Human Services to consider proposing regulations or revising guidance to expand the availability of short-term, limited-duration insurance coverage. Short-term, limited duration coverage policies offer narrow coverage subject to limits and with high out-of-pocket costs, but with low premiums. Short-term, limited-duration coverage is not subject to the ACA's guaranteed issue, guaranteed renewal, essential health benefits, preexisting condition exclusion prohibition, annual and lifetime limits, or other insurance market reform requirements. Importantly, however, short-term, limited-duration coverage does not satisfy the ACA's individual responsibility requirement. As such, individuals who only have short-term, limited-duration coverage are subject to the penalty for non-compliance.

Historically, short-term, limited-duration insurance coverage has been a stop-gap for individuals, such as when between jobs. Prior to 2016, "short-term" meant coverage for less than 12 months. In October 2016, the Departments of the Treasury, Labor, and the Department of Health and Human Services promulgated a final rule defining "short-term" to mean less than three months, effective December 30, 2016. It appears that rule may be short-lived.

Because short-term, limited-duration insurance coverage is cheaper, it may be a more attractive option than pricier coverage with richer benefits available on the exchanges for healthy individuals. This would result in adverse selection and impair the stability of the exchange market as insurers raised premiums or exited the exchanges altogether.

Increased Competition and Antitrust Enforcement

The Executive Order also suggests that the administration will try to address affordability and quality by using antitrust enforcement to promote health care competition. It states that the administration will "continue to focus on promoting competition in health care markets and limiting excessive consolidation throughout the health care system." In particular, it states that government rules and laws should "re-inject competition into health care markets by lowering barriers to entry, limiting excessive consolidation, and preventing abuses of market power[.]" The Executive Order also requires a report, with Federal Trade Commission input, about state and federal laws, regulations, and policies that conflict with the goal of promoting competition, as well as potential actions that states and the federal government could take to increase health care competition. The competition aspects of the Executive Order are less immediately impactful as the Department of Justice and FTC have been historically active and aggressive enforcers in health care markets.

Health Reimbursement Accounts

In addressing how employers may help better fund this new initiative, the president is seeking to dramatically alter the way in which HRAs are designed, funded, and administered. In an administration that loves a big reveal, this is not one. The GOP has long had a love affair with employee-controlled and funded Health Savings Accounts (HSAs) so it comes as little surprise to see expansion of HRAs to support alternative health care strategies. The devil, as always, is in the details. HRAs are employer funded arrangements subject to the onerous provisions of the Internal Revenue Code and ERISA unlike, in certain circumstances, HSAs. That means that HRA sponsors (*i.e.*, employers) bear strict fiduciary and other responsibilities under ERISA, including personal liability for officers, directors and others involved in administering such accounts. While providing more choice and flexibility, the HRA proposals arguably heighten burdens on employers—an unusual casualty in an administration bent on reducing regulations and employer red tape.

The Executive Order directs that within 120 days the Secretaries of the Treasury, Labor, and Health and Human Services consider proposing regulations or revising guidance to increase the "usability" of HRAs, "expand employers ability to offer HRAs" and to "allow HRAs to be used in conjunction with nongroup coverage." Such efforts will likely entail revision to IRS guidance governing HRAs to allow use of these accounts to buy coverage on the individual market. Currently an employee is prohibited from using funds in a stand-alone HRA to buy individual health insurance. Legislation passed in December 2016 expanded use of stand-alone HRAs for small employers (those with fewer than 50 employees) known as Qualified Small Employer Reimbursement Arrangements. The president's proposal builds on that momentum.

Funding for Cost Sharing Reductions

Late yesterday after issuance of the Executive Order, the Trump Administration announced that it would discontinue cost-sharing reduction (CSR) payments immediately, citing legal review by the Department of Health and Human Services, the Treasury, the Office of Management and Budget, and the Attorney General. The administration said that it has concluded it cannot make the payments without a valid appropriation from Congress. The Obama Administration had argued, in *U.S. House of Representatives v. Burwell*, that there was a valid appropriation. The district court ruled in favor of the House. That case is currently on appeal before the D.C. Circuit, where 17 states intervened in August, arguing that the Trump Administration would not adequately represent their interests supporting continuation of the payments.

Implications

The timing of the CSR announcement is significant. The legal issue has been poised for decision for months, and coming simultaneously with the Executive Order must be seen as one integrated policy. Indeed, the administration has been explicit in coupling these announcements with an invitation to Congress to continue to work on health care reform. The CSR funding cut off and the Executive Order's explicit intention to segregate healthy people out of the ACA risk pools are likely to make the ACA marketplaces unattractive to insurers. At the same time, since healthy people have improved options outside the exchanges, the ACA marketplaces will be left insuring relatively unhealthy people who must purchase through the exchanges in order to get a federal tax credit applied to their premiums.

The next few weeks will be critical for both insurers and consumers.

- Insurers have locked in premiums for next year and while some anticipated a lack of funding for the CSRs, and priced their policies higher as a result, some did not. As some insurers pull out of the exchanges for 2018, others will be under pressure to do the same.
- The insurers' most immediate and potentially biggest financial impact will be for the fourth quarter of this year. The insurers are obligated to continue to offer coverage to the CSR-eligible population and cannot start charging co-pays or deductibles to make up for the government's lack of funding. Such a large financial drain on the insurers is likely to impact their willingness to offer plans for 2018.
- The ACA open enrollment period for 2018 starts on November 1st—if Congress does not act very soon to restore CSR funding the ACA marketplaces will face significant instability. Some states have anticipated the need to fund CSRs, and some plans will offer products assuming the CSR shortfalls, but will need to react to the unanticipated worsening of the risk pools. It is an inherently complex situation likely to make coverage significantly more expensive for many people. Moreover, the CSR funding may increase the amount of tax credits needed, further complicating the federal budget impact for 2018.

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[1] The term "employer" is defined in section 3(5) of ERISA as "… any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity."

[2] 29 C.F.R. § 2510.3-3(c) (Self-employed individuals and their spouses are not employees and, therefore, not eligible for employee benefit plans.)

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