



President Trump Once Again Attempts To Dismantle The Affordable Care Act

Insights

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After multiple failed attempts by Congress to reform the Affordable Care Act (ACA), President Trump announced several weeks ago that the federal government would stop making subsidy payments to insurers who sell coverage under the ACA, while simultaneously releasing another executive order aimed at weakening the statute. Now that some time has passed and we have a better sense of the implications of these actions, what do employers need to know about this October 12 one-two punch?

Congress And Courts Spar Over Subsidy Payment System

First, with regard to the subsidy payments, the federal government provides these subsidies to insurers to reduce low-income individuals' cost of purchasing coverage on exchanges. It is estimated that these subsidies amounted to \$7 billion this year. Ending these subsidy payments could cause insurers to cease providing coverage through the exchanges, which would make health coverage more expensive, and likely unaffordable, for a number of low-income Americans. Because of this dynamic, the president's recent announcement raised concerns that exchange premiums would increase even more than anticipated.

Following President Trump's announcement, a number of states jointly filed suit seeking a preliminary injunction to block his decision. The lawsuit claims that the administration violated federal law by ordering the end of these subsidies. On October 25, a California federal court denied the preliminary injunction and indicated that, based on a brief review of the issue, the Trump administration has a stronger legal argument.

Meanwhile, on October 17, Senators Patty Murray (D-WA) and Lamar Alexander (R-TN) sponsored a bipartisan agreement that would continue the subsidies for two more years. If this effort can get sufficient support in Congress, it could help to stabilize prices, even if only temporarily. Between Congressional efforts and the courts, the future of these subsidies remains unknown.

The Executive Order

At the same time he issued this subsidy announcement, President Trump signed another executive order seeking to reform the ACA, this one titled "Promoting Healthcare Choice and Competition Across the United States." In the order, the president instructed a number of agencies – including Health and Human Services (HHS), the U.S. Department of Labor (USDOL), and the Department of the Treasury (IRS) – to draft or revise existing regulations and guidance consistent with the

executive order's priorities. Because we do not know what the actual content of the rules will be, it is impossible to know right now what impact this executive order may actually have.

As written, the executive order seeks to expand small employer access to association health plans (AHP), the availability and duration of Short-Term, Limited Duration Insurance (STLDI); and the availability and permitted uses of Health Reimbursement Arrangements (HRA).

Association Health Plans (AHP)

The executive order instructs the agencies to propose a new regulation or revise existing guidance to expand the availability of AHPs to small employers. AHPs currently exist as multiple employer welfare arrangements (MEWAs). The premise of MEWAs is that a group or association of employers can be treated as a single employer for ERISA purposes and the MEWA will satisfy certain legal requirements rather than each individual employer having to do so on its own.

The USDOL only permits the association of employers to be treated as a single employer if it qualifies as a "bona fide group or association" because the participating employers have a commonality of interest based on a number of factors. The executive order specifically instructs agencies to expand what situations would satisfy the commonality-of-interest requirement. Presumably, the administration would prefer the test to be less rigorous so that more loosely related employers, or employers who have no relationship whatsoever, can band together to form an AHP. The administration is also likely seeking to exempt AHPs from certain provisions of the ACA so that they can offer lower-benefit, lower-cost plans.

Currently, MEWAs, unlike most other employer-sponsored health plans, can be regulated by state law. For example, many states prohibit or heavily regulate self-insured MEWAs. Self-insured care, however, can provide cost savings over fully insured health care, especially with larger groups. Therefore, it would not be surprising to see a proposed rule to limit state regulation and permit AHPs to self-insure or preempt state legislation.

Short-Term, Limited Duration Insurance (STLDI)

STLDI is a short-term health care solution that can only offer coverage up to three months and typically does not meet ACA coverage requirements. The result being these policies are usually cheaper than alternative products on the market since they offer fewer benefits. For example, many do not offer coverage for pre-existing conditions, meaning they do not count as coverage under the ACA individual mandate. The executive order seeks to make STLDI an alternative to enrolling in exchange coverage and extending the coverage period from three months to up to one year. Because STLDIs offer fewer benefits, they are generally only a viable option for younger, healthier individuals. Many critics are concerned that increasing the availability of STLDI will lead younger and healthier individuals to opt out of exchange coverage, leaving only older, less healthy individuals on the rolls. If that were to happen, exchange coverage prices may continue to increase for those who already have fewer coverage options.

Health Reimbursement Arrangements (HRA)

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HRAs are employer-funded arrangements that can reimburse employees for certain medical expenses. Although the previous administration introduced Qualified Small Employer Health Reimbursement Arrangements (QSEHRA), which permit small employers to contribute amounts to employees so they can purchase medical coverage under certain circumstances, these arrangements are limited to employers who have fewer than 50 employees.

The executive order seeks to give employees more “flexibility” with their HRAs, which likely would mean permitting employees – even those employed by large employers with over 50 full-time equivalent employees – to use HRA amounts to purchase individual insurance or perhaps to let employees contribute to their HRAs on a tax-free basis.

What Should Employers Do Next?

First and foremost, employers should continue to comply with the ACA, as applicable. Although the executive order may reveal the administration’s priorities and its strategy to reform the ACA, the statute is still the law of the land. The IRS’s October 13 announcement appears to be reiterating this fact. In that Friday the 13th reminder, the agency informed taxpayers that, for the first time, it will not accept electronically filed individual income tax returns unless the taxpayer has provided healthcare coverage information on the return. Employers should similarly be prepared to continue to comply with the ACA, including the ACA reporting requirements, until something more definitive is known.

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