THE AFFORDABLE CARE ACT: POTENTIAL IMPACT OF THE PRESIDENTIAL ADMINISTRATION CHANGE

Barely a week in the rearview mirror, the election of 2016 has brought monumental uncertainty to health benefit plans. President-elect Donald Trump stated unequivocally during the campaign that he would "get rid of Obamacare" and with Republican majorities in both the House of Representatives and the Senate, he appears to have the legislative support to do so. Moreover, opposition to and the promise to repeal the Affordable Care Act (ACA) has been a mainstay of Republican campaigns since 2010. There have been more than 60 attempts to repeal all or part of the ACA in the last seven years. The voters who elected an outspoken new President and Republican majorities in both houses of Congress will expect results.

In this new political environment, benefits managers are understandably asking many questions about the future of the ACA: Will the entire law be repealed? How quickly will that happen? What else is likely to be enacted in its place? What does this mean for employers in California? Right now, there are no certain answers, except that once again, health care reform is likely to be the first order of business of a new administration that is committed to sweeping change. Below is an analysis of what that change may look like and what the challenges will be for lawmakers. Our analysis is broken into three parts: Repeal, Replace, and California.

REPEAL

Complete repeal of the law will be challenging, if not impossible, for two reasons: (1) Republicans do not have a filibuster proof majority in the Senate, and (2) there are parts of the law that have proven popular. Moreover, President-elect Trump has made comments in recent days that he would like to keep intact at least two of the most popular aspects of the ACA.

Since any efforts for complete repeal are unlikely to make it through the Senate, it is more likely that parts of the ACA could be repealed through the budget reconciliation process, which requires a simple majority of 51. This is the process that was used to pass the ACA in 2010; it was also the process House and Senate Republicans used in 2015 to pass legislation that repealed key parts of the ACA. There are also limits to what can be enacted or repealed through budget reconciliation; the provisions must be related to revenue. Congress would not be able to repeal provisions unrelated to revenue.

What might this look like? The 2015 legislation vetoed by President Obama provides what policymakers in the Capitol believe will likely be the baseline for "repeal" legislation. H.R. 3762 would have:

- Phased out funding for subsidies to help individuals afford insurance purchased through the exchanges;
- Eliminated the tax penalties for individuals who do not purchase health insurance and employers with 50 or more employees who do not provide health coverage to employees;
- Eliminated the medical device tax and health insurance providers fee;
- Eliminated the "Cadillac tax" on higher-cost employer-provided health benefits; and

- Phased out the ACA expansion of Medicaid over a two-year period.

As noted above, there are provisions of the ACA that are not related to revenue and some of these provisions have had broad public support. Congress is unlikely to repeal provisions extending coverage of dependent children to age 26, the prohibition against annual and lifetime dollar limits, or the prohibition against pre-existing condition exclusions.

Finally, although Congress would not be able to repeal non-revenue related provisions through the budget reconciliation process, there could still be significant changes to these provisions through regulatory and sub-regulatory guidance from the executive branch agencies. For example, under the Trump administration, the U.S. Department of Health and Human Services could potentially revisit its definition of "preventive care" as it relates to birth control, which has been a contentious issue since enactment.

REPLACE

This is where predictions become somewhat more difficult. To date, critics of the ACA have not coalesced around a single plan. President-elect Trump's campaign proposals touching on health care reform have been brief. He has endorsed expanding the use of Health Savings Accounts (HSAs), allowing the purchase of insurance coverage across state lines, making the cost of individual health coverage premiums tax deductible, price transparency in medicine, block-granting Medicaid and allowing prescription drug imports.

Among the other, more detailed plans that have been discussed in the wake of the election is the "A Better Way" plan introduced by House Speaker Paul Ryan in June of 2016. Ryan's plan included many elements that have been common to Republican "replace" plans, including:

- Buying insurance across state borders
- Tax credits for individuals to purchase health insurance
- Expanding use of HSAs and Health Reimbursement Arrangements
- Allowing Association health plans and individual health pools
- Medical malpractice reform
- Capping the tax exclusion for employer-sponsored health coverage
- Removing Equal Employment Opportunity Commission restrictions on wellness plans
- Adjusting age rating ratios
- Establishing high risk pools

Ryan's plan also outlined major changes to federal Medicare and Medicaid programs. While the various proposals lay out general ideas, the lack of details make it challenging to predict what a replacement plan would look like. It is also important to remember that even once legislation is passed, the federal agencies will need to implement regulations, which could take several months or longer. The bottom line is that repealing and replacing the ACA is not going to happen overnight. Just as the full enactment of the ACA has taken time, so will the unwinding of it.

CALIFORNIA

Since 2010, California has been at the forefront of enacting the ACA at a state level. What that means is that many of the ACA's provisions are enshrined in state law. In some cases, California went even further than the federal law. California has statutes on the books mirroring or enhancing ACA provisions with regard to:

- Essential health benefits and coverage of preventive services,
- Prohibitions on discrimination,
- Annual and lifetime dollar limits on coverage,
- Limits on cost-sharing, including deductibles and out-of-pocket maximums,
- Coverage of emergency services,
- Standardized benefits, and many other provisions.

It remains to be seen whether and how California will unwind this legal tangle, but at least at present, many of these laws will stay on the books until the California legislature acts to repeal or amend them.

There is also the matter of Covered California and whether California will be able to maintain its Exchange. It has been estimated that California receives more than $20 billion a year to subsidize consumers who buy policies on the Exchange and to pay for others who became eligible for free or low-cost care under Medi-Cal. Maintaining that level of subsidized coverage would take a substantial ongoing investment from the state and it is unclear whether purchasers would continue using the Exchange absent the subsidized coverage to which it provides access.

NEXT STEPS: HOLD TO EXISTING LAW

While we wait to see what the new Administration and Congress will do with the ACA, employers and carriers must continue to administer their plans in full compliance with existing law, unless and until each provision is repealed. This includes the reporting under Internal Revenue Code sections 6055 and 6056 that is due in early 2017. At present, employers subject to the Employer Mandate are still obligated to provide statements to their full-time employees and to report to the Internal Revenue Service by the applicable deadlines.

Keenan has been at the table at a state and national level, talking to clients and policymakers about what is likely to happen. As we have always done, we will continue to advocate for affordable health coverage for our clients. As health care reform proposals coalesce, we will continue to keep you informed and seek your input. Through the coming weeks of uncertainty, you can be certain that Keenan will explain, in real time, what changes are coming your way.

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