

Client Update

The Uncertainty in Health Care Policy A Year in Review

By Michael S. Grant

Since the new administration took office in January 2017, there have been numerous proposals with respect to the country's healthcare laws. This made it a challenging year for any organization that offered health insurance to its employees. Employers must plan benefits programs for the near and long term and also give their employees guidance. But even the most basic rules about who is entitled to what sort of health coverage are still up in the air.

And yet, despite the uncertainty, employers must start preparing for the most likely changes in policy in 2018 and beyond.

Prepare for Ambiguity When Trying to Comply with Healthcare Regulations

Shortly after his inauguration, President Trump signed an executive order directing federal agencies to use discretion in enforcing mandates in the Affordable Care Act, a.k.a. the ACA or Obamacare. While this was an effort to ease the burden on employers, the effect has been to create an environment of uncertainty because government regulators have stopped issuing guidance on how to comply with the current law, leaving many ambiguities in place.

One particular area of concern is the enforcement of the ACA's core requirement that companies offer health insurance to employees working more than 30 hours a week or, if they don't, that they pay a tax. Still unclear is whether the Internal Revenue Service (IRS) will be enforcing the law as it is written today.

While the current administration continues efforts to chip away at the mandates of the ACA, the IRS has begun issuing employer shared responsibility penalty notices in late 2017 for the 2015 calendar year.

As it appears the IRS will continue to enforce the employer mandate, employers should continue to comply and file all ACA-related paperwork unless the government explicitly says otherwise.

The Various Attempts to Repeal the ACA

Rather than enforcing ACA regulations, Congress focused its efforts on repealing the law through a reconciliation (or budget) bill. To pass into law, this type of bill only needs a simple majority of votes from Congress. In effect, lawmakers would only need to lean on the Republican side of the aisle, garnering just 50 of their votes (and the Vice President's vote as the tie breaker).

Central goals of the first two budget bills proposed in 2017—the American Health Care Act (AHCA) passed by the House in May and the Better Care Reconciliation Act of 2017 (BCRA) proposed by the Senate in June—were to allow state waivers of the ACA's essential health benefits, phase out Medicaid expansion, terminate various ACA taxes and introduce new tax credits. Also, they planned to reduce the individual and employer mandates to \$0. Additionally, the AHCA would have placed a surcharge on premiums for individuals who have a gap in coverage.

These first two bills not passing muster, on July 19, the Senate released a third bill: the Obamacare Repeal Reconciliation Act (ORRA) of 2017. This legislation also promised to set the penalties of the individual and employer mandates to \$0 and end premium tax credits and cost-sharing reduction payments. But it didn't include provisions to defray consumer costs or change ACA provisions. In a matter of days, talks of the bill eventually turned into a consideration of a "skinny repeal," which consisted of repealing a few major provisions of the ACA. However, by July 27, the bill—given the official name of the Health Care Freedom Act—was also voted down.

Then, two weeks before the budget resolution was set to expire on September 30, a group of Republican senators released their final fast track repeal effort of 2017. This bill, informally named Graham-Cassidy, was much like its predecessor bills. It would have repealed the individual and employer mandates, removed existing guarantees for coverage of pre-existing conditions, replaced Medicaid expansion with state block grants that would disappear completely in 2027, and terminated premium credits and cost-sharing subsidies. In addition, it would have changed federal government funding amounts to states (some would gain, while others would lose funding).

With all of these bills, the Congressional Budget Office (CBO) estimated millions more Americans would go without coverage, with estimates ranging from an additional 15 to 31 million people (in addition to the 28 million under the current law).

Finally, in a last minute effort to undermine the ACA, Republicans effectively added the repeal of the individual mandate to the tax reform bill passed into law in December.

Two Considerations in Light of an Employer Mandate Repeal

While it is true that starting 2019, individuals who don't have health plan coverage will no longer pay a penalty, consider how your benefits will change if the employer mandate were repealed.

Organizations should consider how to plan for additional repeal efforts that could resurface in 2018.

The various Republican bills of 2017 would have repealed the requirement that employers with more than 50 employees must offer health insurance to full-time employees. They would also have allowed states to eliminate some of the essential benefits that the ACA required corporate-sponsored insurance to cover.

Additional repeal efforts could resurface in 2018, and organizations may want to begin to consider how they would react if the employer mandate were repealed and other reforms are implemented. It may be possible to reduce expenses by offering insurance to fewer employees or switching to less generous plan structures.

If the employer mandate were to go away, while some organizations may consider dropping insurance on the assumption that their employees will be able to buy individual insurance, most would likely keep their current insurance programs in place, at least in the short term. This is because employer offerings tend to be more robust than what is available in the individual market, and are an effective way of retaining and attracting top talent.

Evaluate high-deductible plan options.

Many aspects of the Republican bills encouraged health insurance policies that have more limited benefits and higher deductibles than typically offered under current law. If this approach is adopted, employers may want to leverage their newfound flexibility to offer lower-cost plans.

Additionally, a popular sentiment (included in the first two GOP proposals) is to raise the contribution limits for Health Savings Accounts (HSAs), which are often combined with high-deductible insurance, to give participants a way to cover their out-of-pocket expenses.

Understanding the trade-offs between keeping your current benefit design and moving to a plan that offers less coverage or higher deductibles can mean staying ahead of the curve and saving your company money. However, employers may well decide that they don't want to adopt these lower-cost plans because they want to keep their workforce healthy and retain employees who might otherwise move to other companies with richer benefits.

Nonetheless, benefit managers should prepare to discuss whether to cut benefits if additional changes to the ACA materialize.

Part-time Workers May Press for Employer-Sponsored Health Insurance

Indeed, even though none of the proposed health reform bills came to a vote, the administration can perform administrative actions to reduce government spending on healthcare and dismantle parts of the ACA that don't require Congressional approval.

For example, they might be able to withhold a class of payments to insurance companies called cost-sharing reductions (CSRs), a move that many experts suggest will destabilize the individual insurance market. If this were to happen, employers may see that part-time employees who

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have been receiving subsidies for buying health insurance on exchanges will ask for coverage through their workplace.

We have already seen the administration extend its power: On October 6, the administration expanded the types of employers and insurers that could exempt themselves from covering contraceptives by claiming religious objections.

Employers Should be Aware of Evolving State Laws

As long as states can prove their state system will provide comprehensive and affordable coverage that will cover as many people as would have been covered by the ACA, then they can be granted a waiver for certain ACA requirements (per Section 1332 of the law). With this waiver, a state would directly get the federal funding that would have otherwise gone to support the ACA.

Because of the uncertainty in the health care system, states are increasingly taking advantage of this section and taking health reform into their own hands. For example, states are implementing or proposing their own health care laws, looking for flexibility in implementing and maintaining ACA mandates despite what happens at a federal level, and proposing single-payer systems for their respective states. As the consumer experience grows increasingly individualized by state, multi-state employers will need to navigate these changes and make sure their benefit programs are in compliance across all states where they have employees. These types of changes can also affect the population of consumers that choose individual versus group-sponsored coverage, ultimately affecting the types of plans employers offer.

Looking Ahead

At the end of the year, the President signed a tax overhaul bill that will repeal the individual mandate in 2019. The delay is meant to give Congress time to implement measures that will stabilize the individual market before the repeal takes place. As the health care reform debate continues, there are a number of "hot" issues to look out for in 2018. Congress can attempt to pass a reconciliation health care bill in 2018, but only if they pass a new budget resolution for the 2018 fiscal year. Then, they can again try to pass a health care repeal bill that only requires a simple majority of votes from Congress.

Meanwhile, bipartisan efforts to stabilize health insurance costs are brewing. Additionally, support for Bernie Sanders' Medicare-for-all bill (his approach to a single-payer system of coverage) had swelled among many Democrats in Congress. Whether that support continues in 2018 is yet to be seen.

Additionally, look out for single payer systems and changes to health reform laws at the state level, measures by Congress to stabilize the individual market before the individual mandate repeal takes place, attempts to repeal various ACA taxes (including the Cadillac tax) and an increasing number of high-deductible plans.

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Regardless of what changes emerge in the health care landscape, employers should be flexible when considering their benefit plans and entertain alternative approaches they may have passed up in previous years.

BILLS TO WATCH IN 2018

Various bills related to health care and insurance currently up for review in congress

KIDS Act of 2017 (S. 1827) and HEALTHY KIDS Act (H.R. 3921)

Extend funding through 2022 for the Children's Health Insurance Program (CHIP), among other provisions, allow states to adopt more restrictive eligibility standards.

CHRONIC Care Act of 2017 (S. 870)

Implements Medicare payment policies designed to improve the management of chronic disease, streamline care coordination and improve quality outcomes.

Protecting Seniors Access to Medicare Act (H.R. 849)

Terminates the Independent Payment Advisory Board established by the ACA, which makes recommendations regarding reductions in Medicare spending.

No Taxpayer Funding for Abortion and Abortion Insurance Full Disclosure Act of 2017 (H.R. 7)

Permanent prohibition of the use of federal money (including subsidies for health care plans) for abortions. Prohibitions do not apply to abortions in the case of rape or incest, or where a physical condition endangers a woman's life unless an abortion is performed.

Competitive Health Insurance Reform Act of 2017 (H.R. 372)

Repeals the McCarran-Ferguson Act exemption to the business of health insurance, so that antitrust laws can be enforced against health and dental insurance companies that engage in unfair methods of competition.

Small Business Health Fairness Act of 2017 (H.R. 1101)

Amends ERISA to allow small businesses to join together in association health plans across state lines.

Employee Fairness and Relief Act of 2017 (H.R. 661)

Allows health insurers in the small group market during 2013 (grandfathered plans) to offer coverage outside the health insurance market exchanges.

Self-Insurance Protection Act (H.R. 1304)

Ensure federal government cannot regulate stop-loss insurance. The bill doesn't restrict regulation at the state level.

For more information, go to congress.gov.



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