President Trump Issues Executive Order on ACA, Separately Attempts to End Cost-Sharing Payments to Insurers

On October 12, President Trump signed an Executive Order directing the federal agencies in charge of implementing the Affordable Care Act (ACA) to propose new regulations or revise existing guidance to expand access to association health plans (AHPs), short-term insurance plans, and health reimbursement arrangements (HRAs). While the order directs the agencies to consider changes that would have a sweeping effect on the health insurance industry, it has no immediate effect – any changes in rules or regulations will be subject to standard notice and comment periods.

Separately, the President intends to stop the government's reimbursement of cost-sharing reduction (CSR) payments made by insurance carriers that participate in the ACA's Health Insurance Marketplaces. A letter from Health and Human Services (HHS) to the Centers for Medicare and Medicaid Services (CMS) indicated that payments will stop immediately, effective with the payment scheduled for October 18, 2017. The move resulted in a lawsuit filed on October 13, 2017, in federal court in the Northern District of California by a coalition of nearly twenty states against the Trump administration seeking declaratory and injunctive relief requiring that the CSR payments continue to be made. If the CSR payments are not continued by Congress (by appropriating funds for the payments) or through judicial action (by finding that the ACA contains a permanent appropriation for the payments), it will have a much more immediate and disruptive effect on the individual market than the Executive Order. It may also impact the small and large group markets, which rely on the individual market to provide coverage in certain cases to part-time employees, an alternative to COBRA, and encourage early retirement by offering a bridge to Medicare, as well as avoiding further cost-shifting from health care providers to private plans in response to shortfalls in public payments.

Notably, the cessation of CSR payments does not impact an employer's obligations under the ACA's "pay-or-play" mandate, as penalties under that mandate are triggered by a full-time employee's receipt of a federal premium tax credit, which continue to be funded under the ACA's permanent appropriation.

Executive Order – Expansion of Association Health Plans

The order provides that, within 60 days of October 12, the U.S. Department of Labor (DOL) should consider proposing regulations or revising guidance to allow more employers to form AHPs. The order directs the DOL to consider expanding the conditions that satisfy the commonality-of-interest requirements under current Department of Labor

advisory opinions interpreting the definition of an "employer" under the Employee Retirement Income Security Act of 1974 (ERISA). In addition, the order directs the DOL to consider ways to promote AHP formation on the basis of common geography or industry.

While the order itself is brief and does not offer much detail, an expansion of the definition of "employer" under ERISA might mean that the administration is considering ways to allow individuals and small employers to be treated as "large groups" for purposes of the ACA's market reforms. Under the ACA, health plans offered to individuals and small employers generally must include coverage for services in all ten categories of essential health benefits, and the premium rates cannot vary based on health status (rates may vary based only on age, tobacco use, geographic area, and family size). If individuals and small employers could form "associations" to purchase health insurance as "large groups," they could offer leaner, less expensive plans that might appeal to younger, healthier individuals. For example, large group plans may, subject to any state insurance mandates applicable to fully-insured plans, exclude coverage for mental health and substance use disorders, prescription drugs, or other costly services that tend to be used by individuals who are older or less healthy.

States traditionally have authority to regulate association health plans and insurance sold in their state and would likely challenge any rules that they perceive could damage their insurance markets. In the past, when association coverage legislation was proposed, there has been opposition by various state governments, consumer, business, labor and health care provider and patient advocacy groups because of concerns regarding "cherry-picking" of healthier individuals (in turn, causing those with pre-existing conditions to pay more for such coverage on the open market) as well as concerns that such plans promote fraud and insolvency. Depending on how the rules are written, associations could potentially offer plans across state lines, thus weakening states' regulatory authority. The extent to which any new rules regarding associations will attempt to supersede state authority remains to be seen.

It will also be difficult under existing rules and regulations to fit non-employment based associations within the framework of ERISA, which requires an employment relationship between the plan sponsor and participants. The order doesn't address the potential MEWA status of AHPs. Unless existing regulations are revised, AHPs composed of unrelated employers would still be viewed as multiple employer welfare arrangements (MEWAs) under ERISA, which means that they would be subject to state insurance laws such as solvency and licensing requirements and, except in limited situations, have additional administrative burdens (e.g., Form M-1 filing requirement). It remains to be seen if future regulations would attempt to apply ERISA preemption to certain state requirements that may otherwise apply to MEWAs.

Executive Order – Short-Term Limited-Duration Insurance

Short-term limited-duration insurance (STLDI) is exempt from the ACA's insurance mandates and market reforms. It is intended to bridge gaps in coverage – for example, individuals between jobs or having just graduated from school. Because it's exempt from the ACA, insurers offering STLDI plans may underwrite based on medical history and charge higher premiums for individuals based on health status. In order to prevent younger, healthier individuals from leaving the individual market, Obama-era regulations limited the coverage period for STLDI from less than 12 months to less than 3 months and prevented any extensions beyond 3 months of total coverage.

The order provides that, within 60 days of October 12, HHS, the DOL and Treasury should consider proposing regulations or revising guidance to expand the availability of STLDI. In particular, as long as it is supported by sound policy, the order provides that agencies should consider allowing STLDI to cover longer periods and be renewed by the consumer. As with the section of the order dealing with association plans, states may challenge this order as infringing on their ability to regulate their insurance industry and may resist rules they consider to be disruptive or potentially damaging.

Executive Order – Health Reimbursement Arrangements (HRAs)

HRAs are tax-advantaged, account-based arrangements that employers can establish for employees to give employees more flexibility and choices regarding their healthcare. The order provider that, within 120 days of October 12, HHS, the DOL and Treasury should consider proposing regulations or revising guidance to increase the usability of HRAs, to expand employers' ability to offer HRAs to their employees, and to allow HRAs to be used in conjunction with individual market coverage. This provision appears to be intended to repeal Obama-era rules that required most HRAs to be "integrated" with a group health plan and generally prohibited their use to purchase individual market coverage. Eligible "small employers" (i.e., those with fewer than 50 full-time employees or equivalents) have been able to use HRAs (referred to as Qualified Small Employer HRAs, or QSEHRAs) to reimburse individual market premiums since the start of 2017, a change made by the 21st Century Cures Act, which was passed in December 2016 (several restrictions apply, including the requirement that an employer offer no other group health plan aside from the QSEHRA).

Cessation of Cost Sharing Reduction (CSR) Payments

Also on October 12, 2017, the Trump administration filed a notice with the U.S. Court of Appeals for the District of Columbia Circuit, informing the Court that cost-sharing reduction payments will stop because it has determined that those payments are not funded by the permanent appropriation established for the ACA's premium tax credits. Therefore, the upcoming payment to insurance carriers scheduled for October 18, 2017, will not occur unless a court intervenes and orders the payment to be made, or Congress appropriates the funding.

The move was met with a swift reaction from the Attorney General of California, who led a coalition of nearly 20 states in a lawsuit against the Trump administration, alleging that the sudden decision to stop the CSR payments did not evolve from "a good-faith reading of the [ACA]" and "is part of a deliberate strategy to undermine the ACA's provisions for making health care more affordable and accessible" by making it more difficult and expensive for individuals to obtain health insurance through the ACA's Health Insurance Marketplace.[1]

When Congress enacted the ACA, it intended to increase the number of Americans covered by health insurance and decrease the cost of health care. To achieve these goals, the ACA adopted a series of mandates and reforms, including the creation of the Health Insurance Marketplace and provision of billions of dollars in federal funding to help make health insurance more affordable for low- and moderate-income Americans. These subsidies help offset premiums as well as participant cost-sharing, such as deductibles and coinsurance. The CSR payments to carriers reimburse them for reductions in participant cost-sharing that the carriers are required to apply under the ACA.

The premium subsidies and CSRs are generally paid directly to insurance carriers. The ACA requires the IRS to ensure payment of the premium tax credits and requires HHS to make "periodic and timely" payments to insurance carriers for the CSRs. The premium credits and CSRs are paid through a single, integrated program created by the ACA. To fund this integrated system of health insurance subsidies, the ACA established a permanent appropriation for amounts necessary to pay refunds due from the premium tax credit and CSR subsidies. The lawsuit asserts that the Executive Branch has the authority and obligation to make premium tax credit and CSR payments to insurers on a regular basis and that no further appropriation from Congress is required. The lawsuit also alleges that the sudden cessation of the payments is

[1] The lawsuit highlights various efforts by the Trump administration aimed at weakening the Marketplace, including the administration's substantially reduced efforts to educate and encourage individuals to sign up for health insurance through the Marketplace. In addition, HHS has reduced its advertising budget for the Marketplace program to $10 million, a 90% decrease from the $100 million allocated for the program in 2016. HHS also reduced the amount of money granted to nonprofit organizations that serve as "navigators" to help individuals enroll in health plans offered through the Marketplace to $36 million, as compared to $63 million in 2016. HHS has also reduced the Marketplace open enrollment period from twelve weeks to six, and has announced that it will shut down the HealthCare.gov website for 12 hours every Sunday during the open enrollment period.

arbitrary and capricious under Administrative Procedure Act (APA), as the government failed to adequately explain their decision that they no longer have the authority to make CSR payments. Lastly, the complaint alleges that by refusing to make the CSR reimbursement payments mandated by the ACA and its permanent appropriation, as well as taking the other actions described above, the President is violating the Take Care Clause of the U.S. Constitution, which provides that the President must "take Care that the Laws be faithfully executed."

It is also worth mentioning that stopping the approximately $7 billion per year in CSR payments is predicted to cost the federal government nearly $200 billion over 10 years, according to the Congressional Budget Office. This is because the average amount of premium subsidy per person would be greater, and more people would receive subsidies in most years.

The View from MarBar

The Executive Order and the cessation of CSR payments follows a set of regulations released by the Trump administration the previous week that scaled back the ACA's contraceptive coverage requirement. After several attempts to repeal and replace the ACA, a seminal campaign pledge of President Trump, failed to garner enough votes in the Republican-controlled Senate, it appears that the Trump administration is turning to regulatory and sub-regulatory action to make changes to the nation's health care system in what may be an effort to force Congress to revisit legislative action. While some Republicans in Congress view the President's action as expanding "free market reform," there are those on the other side of the aisle that view it as "executive sabotage" of the ACA. The approaches described in the Executive Order expose the Obama administration's reliance on regulatory and sub-regulatory guidance to implement strategies to advance the ACA. Time will tell if the Trump administration's guidance is consistent with faithfully executing the ACA, now that it remains the law of the land for the foreseeable future.

In the meantime, employers should wait to see how any regulations are drafted as a result of the Executive Order. As mentioned, new rules would be subject to notice and comment periods, which should allow employers adequate time to prepare for any changes. Lastly, employers should be concerned with the government's cessation of CSR payments and its potential impact on the group insurance market, especially the potential increase in COBRA participation and delay of early retirement. Health insurance industry trade groups have issued statements indicating that the payments are critical and that there are real consequences to stopping them, in that costs will rise and the insurance markets could become unstable.

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