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CLIENT ALERT

What's Next for Employer Plan Sponsors after Failed Congressional Attempts to Repeal/Replace the Affordable Care Act?

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After the Senate's dramatic failure last week to pass legislation that would repeal and/or replace the Affordable Care Act (ACA), in the form of the Better Care Reconciliation Act, the Obamacare Repeal Reconciliation Act, or their skinnier cousin, the Health Care Freedom Act, employer plan sponsors of group health plans are left wondering what the next steps are as they head into the fall open enrollment season.

While the statutory framework of the ACA remains intact, there are several developments that may occur in Congress on the regulatory front and in the courts that warrant an employer's attention. The next few weeks will be extremely important as events unfold with respect to the individual insurance markets and the viability of state and federal health insurance marketplace exchanges. However, until these developments play out, it is business as usual, albeit with heightened attention, for employers.

The Fate of Cost-Sharing Reduction Payments

President Trump has threatened to stop the payment of cost-sharing reduction (CSR) subsidies to insurance companies, which help make individual insurance policies on the insurance exchanges affordable by covering deductibles, co-payments, and co-insurance (out-of-pocket medical expense amounts) for qualifying individuals. Individuals who are low-income earners struggle to pay out-of-pocket expenses to hospitals and medical providers; CSR payments help with that financial burden. According to the Centers for Medicare and Medicaid Services, in 2017, seven million people qualified for CSR payments, which is equal to approximately 58% of all exchange enrollees. While the Trump administration has continued to make CSR payments to date, the administration is threatening to cease making the payments in the future as leverage to bring Congress back to the table to discuss further initiatives on health care reform.

Insurers who are offering insurance on the state and federal exchanges have agreed to participate with the understanding that CSR payments will be made available to qualified individuals. If CSR payments are eliminated, some insurers may seek to terminate their exchange contracts with the state or federal exchanges early because of the loss of these payments. Alternatively, these carriers may stay in the exchange markets, but increase the cost of insurance premiums to make up for the lost government subsidy payments. Either outcome would impact individuals who elected coverage with those carriers.

In addition, a battle is unfolding in the courts over the legality of the CSR payments based on Congress' failure to appropriate funding for CSRs in the ACA. Earlier this week, the U.S. District Court for the District of Columbia approved a motion to allow 18 Democratic state attorneys general to intervene in the lawsuit originally filed by Republican members of the House of Representatives challenging the legality of the subsidies. By permitting the state attorneys generals to intervene, the case is likely to continue even if the Trump Administration chooses not to defend it. Further, the case may serve as a vehicle for filing an injunction against the Trump Administration if the decision is made not to fund future CSR payments. The CSR subsidies are seen by many as crucial to stabilizing the individual insurance market and have attracted bipartisan support. Continuation of the subsidies will also provide certainty to insurers who are currently deciding whether to remain players on the exchange and are also in the process of submitting rate proposals for health plans sold on the exchange in 2018. Qualified health plan applications in the exchange and final rates are due on August 16, 2017, and final contracts with insurers providing coverage through the exchange must be signed by September 27, 2017.

In response to the current turmoil, the Senate Health Education, Labor and Pensions Committee has announced a series of bipartisan hearings to be held in September aimed at introducing legislation to stabilize insurance markets.

Employer Shared Responsibility – a/k/a the "Pay or Play" Mandate

The employer and individual shared responsibility requirements of the ACA—the so-called individual and employer mandates—would have been repealed under both the House and Senate bills, but remain intact under the ACA. While there is widespread support for repeal of the employer mandate, repeal of the individual mandate has proven more problematic because of its potential "jenga-like" effect on the individual insurance market. Without an incentive to prompt healthy people to purchase insurance, the insurance risk pool in the individual market would narrow to older, sicker individuals, which in turn would drive up premiums. Yet, insurers are still hamstrung by the ACA requirements to cover essential health benefits and individuals without any pre-existing condition exclusions, in addition to complying with age and community rating restrictions. What happens in the individual market is important to employers as many rely on the availability of the exchanges as a strategy for making sure their part-time workforce has health insurance coverage and for bridging early retirees to Medicare. A less attractive individual market may increase pressure on employers to cover these vulnerable groups, especially in a tightening labor market.

To date, the Internal Revenue Service (IRS) has relaxed enforcement of the individual mandate and did not require taxpayers to report whether they had health insurance coverage on their 2016 tax returns. However, the IRS has not relaxed enforcement of the employer mandate. Although the IRS has acknowledged glitches in the ACA reporting system, the IRS has confirmed that an applicable large employer is still subject to an employer shared responsibility payment if it (i) fails to offer coverage to 95% of its full-time employees or (ii) has a full-time employee who obtains coverage on the insurance marketplace and receives premium assistance or a tax credit, and the employer's coverage is not affordable or did not provide minimum value.

Large employers should continue to offer minimum essential coverage to their full-time employees to avoid penalties and to track offers of coverage in order to comply with reporting requirements on IRS Forms 1094 and 1095. The IRS has been sending rejection notices and inquiries to employers regarding 2015 and 2016 Form 1094 and 1095 filings with respect to incorrect taxpayer ID numbers, incorrect employer ID numbers, incorrect employee or dependent social security numbers, and failure to file. The failure-to-file inquiry is usually triggered when a company is filing an IRS Form W-2 for an employee and is identified as a large employer, but has not filed Forms 1094 or 1095 with respect to such employee. The ACA requires each member of an aggregated applicable large employer group (controlled group of companies) to report on Forms 1094 and 1095, even if it has fewer than 50 employees. In addition, with respect to ACA reporting, the IRS does not permit an employer to disregard controlled group members and report on a consolidated corporate return. Unless the IRS announces non-enforcement relief, employers can expect to receive Notice and Demand for Payment letters from the IRS for failure to comply with the employer shared responsibility requirements.

Bipartisan Legislative Proposals

Congressman Kurt Schrader (D-Ore.) recently proposed a solution supported by the bipartisan Problem Solvers Caucus to amend the ACA, which includes the following components:

- Bring CSR payments under the Congressional oversight and appropriations process, but ensure they have mandatory funding.
- Create a dedicated stability fund that states can use to reduce premiums and limit losses for providing coverage—especially for those with pre-existing conditions.
- Adjust the employer mandate by raising the threshold on the requirement for employers to provide insurance under the employer mandate to businesses of 500 employees or more. Additionally, the definition of “full time” under the employer mandate should indicate that a full-time work week is 40 hours.
- Repeal the medical device tax. This tax adds a 2.3% sales tax on medical device supplies.
- Provide technical changes and clear guidelines for states that want to innovate on the exchange or enter into regional compacts to improve coverage and create more options for consumers.

ACA Reforms Favored by Employer Groups

For the moment, a full-scale repeal of the ACA taxes and onerous employer reporting obligations appears to be out of reach due to the August Congressional recess and the inability of Congress to achieve consensus. However, employers are hoping Congress can still pass narrowly tailored relief in the form of standalone legislation or by including reforms in a bipartisan bill to stabilize the insurance markets. In addition, last January, President Trump issued an Executive Order directing federal agencies to minimize the ACA’s regulatory burden wherever possible. Accordingly, regulatory guidance from the departments with ACA oversight—Labor, Treasury, and Health and Human Services—can be expected in response to the Executive Order, which may give employers relief from the ACA’s onerous employer shared responsibility requirements. Areas where reform could occur include: (i) increasing the size of the employer to whom the tax applies; (ii) increasing the number of hours for determining who is a full-time employee; (iii) simplifying the methodology for counting hours; or (iv) changing the rules applicable to seasonal employees and interns. Efforts to ease and simplify the tax reporting burdens on Forms 1094 and 1095 would also be welcomed by employers.

Employer and industry trade groups are also opposed to the so-called “Cadillac tax” on high-cost health plans, and bipartisan legislation has already been introduced in Congress to repeal the 40% excise tax. Employers are loath, however, to trade elimination of the Cadillac tax for taxes imposed on employees for the cost of employer-provided health care. Finally, any changes to the maximum contributions that may be made to health savings accounts and health care spending account plans, which are popular with employers, would require legislative action.

Employers should continue to follow developments in the health care reform area as they finalize their 2018 health plan offerings.

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