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EXPERT ANALYSIS

President Trump and the Affordable Care Act: What Happens Now?

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Hours after being sworn in as the 45th president of the United States, President Donald Trump signed an executive order directing the various heads of governmental agencies to ease the financial burden of the Patient Protection and Affordable Care Act (the "ACA").

Specifically, the order directs these agencies to "exercise all authority and discretion available to them to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the [Affordable Care] Act that would impose a fiscal burden on any State or a cost, fee, tax, penalty or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products or medications."

The executive order certainly sends a strong message that President Trump intends to make good on his campaign promise to repeal and replace the ACA. However, the order itself, at least for the near future, has little effect on much of the law's impact.

This is because the majority of the ACA's market reforms, including the popular ban on pre-existing condition exclusions and the extension of coverage to dependent children up to age 26, are codified in statutes and regulations, which cannot be undone by a mere executive order. Congressional approval is necessary to repeal the law's market reforms.

What can happen now, with the president's blessing, is that the agencies responsible for administering the ACA, including the Department of Health and Human Services ("HHS"), can exercise broader latitude when enforcing some of the law's fiscal provisions, most notably the individual mandate.

For example, HHS could broaden the categories of individuals who qualify for hardship exemptions from the individual mandate, which would allow more people to remain uninsured without paying a penalty.

The president's executive order comes on the heels of the new Senate approving a bill intended to begin the repeal process. In a 51-48 vote, the Senate approved a budget reconciliation bill, which is legislation pertaining to revenue and the budget and, under Congressional procedural rules, is filibuster-proof.

The Senate started with a reconciliation bill because Republicans do not hold enough Congressional seats to have a supermajority in the Senate. Without a supermajority, Senate Democrats could filibuster the Republicans' attempt(s) to outright repeal the law.

The Senate's reconciliation bill effectively nullifies the revenue-related provisions of the ACA (e.g., tax subsidies for certain low-income individuals who purchase insurance through the Exchanges) without repealing the ACA's market reforms (e.g., the prohibition on pre-existing condition exclusions).

So what does this all mean for the future of the ACA, and the employers and other plan sponsors who have spent the last six years implementing its provisions?

For starters, and most importantly, the executive order specifically states that its directives can be carried out only "to the maximum extent permitted by law." This means that everyone — government agencies, plans, plan sponsors, employers and health insurers — must continue to comply with the ACA's provisions until new regulations or other regulatory guidance is issued.

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This also means that the health plans and policies that are currently in effect will likely remain unchanged, at least for the current plan year.

Second, the executive order directs governmental agencies to stop issuing regulations under the ACA and freeze any pending regulations. This means that unregulated sections of the law, including the extension of nondiscrimination rules to fully insured health plans and the Cadillac Tax (a tax on high cost health plans), remain dormant, potentially indefinitely.

But what choices will employers and plan sponsors face if the ACA is repealed?

Depending on the replacement legislation (if any), the answer may depend on whether an employer sponsors a fully insured or self-insured plan. Employers that sponsor fully insured plans likely will first need to look to their state insurance laws to see what changes can be made, if any.

For example, in New York, many of the ACA's market reforms have been codified in the New York State Insurance Law and Public Health Law. And health insurers in states that have not codified the ACA's market reforms had to approve policies that already incorporated these provisions.

If states are granted the discretion to choose what market reforms are mandatory for policies issued under their laws, it is possible that employers that sponsor fully insured plans in states like New York may continue to be required to offer the benefits first required under the ACA.

Employers that sponsor self-insured plans, which are not subject to state insurance laws, may have more discretion with respect to their plan design.

Regardless of the kind of plan an employer sponsors, all employers will need to consider their plan design options not only in light of what is required or permissible under federal and state law, but also from an employee hiring and retention perspective.

Many employers may choose to retain the plan provisions originally required by the ACA, even if these provisions are no longer required by federal or state law, simply because they benefit their employees and are now considered "market" within their industries.

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