Sibson Consulting

update

Compliance News for Plan Sponsors

April 13, 2017

Congressional Efforts to Amend the Affordable Care Act Stall: What's Next?

Legislation to "repeal and replace" the Affordable Care Act, called the American Health Care Act (HR 1628),[1] was scheduled for a vote in the U.S. House of Representatives on March 24, 2017, but lack of support led the House leadership to call off the vote. This *Update* explains the implications for group health plans and highlights legislative and regulatory developments that plan sponsors should monitor in the coming months.

Implications for Group Health Plans

The Affordable Care Act remains intact and plan sponsors must continue to comply with its many requirements. Unless Congress takes action in the future, the 40 percent excise tax on high-cost health plans (the "Cadillac tax") will take effect in 2020, and all other Affordable Care Act requirements will continue to apply. These include the employer shared responsibility penalty, the individual shared responsibility penalty and other taxes and fees included in the Affordable Care Act. Also still in effect are the various coverage and benefit mandates applicable to group health plans (*e.g.*, the extension of coverage to adult children to age 26, the prohibition on annual or lifetime dollar maximums, and all of the requirements for non-grandfathered plans, such as the obligation to cover certain in-network preventive services at 100 percent). In addition, the rules that determine whether plan changes trigger the loss of grandfathered status continue to apply.

Plan sponsors should watch for other legislative initiatives, including tax reform legislation, and for regulatory changes from the Trump Administration.

Legislative Proposals to Cap Tax Exclusion for Group Health Coverage

In addition to looking out for a resurfacing of health reform legislation, it is also important for plan sponsors to monitor tax-reform legislation. Many speculate that tax reform legislation could repeal (or further delay) the 40 percent excise tax and might also include a cap on the amount of employer-sponsored coverage that an individual may exclude from income and payroll taxes.

This tax exclusion is the single largest tax expenditure in the federal budget, and this foregone revenue is often a target when efforts are made to reform the tax

Health Compliance News Highlights:

- Due to insufficient support to ensure passage, House legislation to repeal and replace the Affordable Care Act was pulled.
- Consequently, nothing has changed for group health plans. Plan sponsors must continue to comply with the law's many requirements.
- Plan sponsors should continue to monitor legislative and regulatory developments, especially efforts to cap the tax exclusion for employer-sponsored health coverage.

[1] For an overview of this legislation, see Sibson Consulting's March 9, 2017 *Update*, "House Publishes Affordable Care Act Repeal and Replace Legislation."

code. Unlike the 40 percent excise tax on high-cost plans, which would be paid by the plan sponsor, employees themselves would pay the income taxes owed on coverage that exceeds the cap.

A House leadership proposal that was *not* included in the American Health Care Act would set a cap on the tax exclusion at the 90th percentile of annual premiums for group health plans for a base year. For example, if 90 percent of premiums for single coverage were $8,000 or lower, the cost of coverage exceeding that amount would be subject to income and payroll taxes. For future years, the cap would be indexed based on the Consumer Price Index plus two percentage points. Under this proposal, coverage for public safety employees would not be subject to the tax, but there would be no other exclusion or adjustment for individuals in high-risk professions or for retirees. Nor did the proposal include any special provisions or adjustments for collectively bargained plans or multiemployer plans.

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Other Possible Legislative Action

Other bills that Congress must act on may provide opportunities for Congress to make changes to the Affordable Care Act. The most pressing legislative vehicle that could attract health-related provisions is the extension of the current continuing resolution, which funds the federal government only through April 28, 2017. Congress needs to fund the government for the remainder of the fiscal year ending September 30, 2017. Health insurers are hoping that Congress will appropriate funding that many believe is already owed to the insurers under current law. Without a satisfactory resolution of these issues, insurers may either stop selling policies in the state Exchanges/federal Marketplace or significantly increase premiums.

Insurers are looking for funding under two different parts of the Affordable Care Act:

- The cost-sharing subsidies that lower out-of-pocket costs for individuals with incomes under 250 percent of the federal poverty level[2] who purchase state Exchange/federal Marketplace coverage; and
- The risk-corridor payments that reimburse health insurers that have higher than expected claims costs.

The federal government is continuing to reimburse insurers for the cost-sharing subsidies while a court case challenging these payments is being appealed.[3] However, those subsidies might stop if the Trump Administration abandons the appeal. The court has set May 22, 2017 as the deadline for a status report from the parties.

With respect to the risk-corridor program, Congress has stopped the Department of Health and Human Services (HHS) from making payments to insurers that exceed the amount of funds collected by HHS for this program from insurers as a whole.

Another legislative vehicle relates to the Children's Health Insurance Program (CHIP), which provides health care for approximately 8.4 million children in families whose incomes are too high for Medicaid, but for whom employer-sponsored coverage is unavailable. CHIP is permanently authorized, but without congressional action, states will not receive any new federal funds for coverage beyond September 30, 2017.

[2] For a single individual, 250 percent of the federal poverty level is approximately $30,000.

[3] The appeal is before the U.S. Court of Appeals for the D.C. Circuit. The case is *House v. Price* (formerly *House v. Burwell*).

While Congress might proceed with other health-related legislative initiatives, such as legislation to enhance Health Savings Accounts (HSAs), the need to garner 60 votes in the Senate makes it less likely that such efforts would be successful.

Possible Regulatory Action

The Trump Administration could use available regulatory and enforcement tools to attempt to change some portions of the Affordable Care Act. While existing final regulations could generally be overturned only through formal rulemaking (after notice and comment), there is a great deal of sub-regulatory guidance on the Affordable Care Act affecting group health plans, such as answers to frequently asked questions, that could be changed or removed without a formal process. So far, the Trump Administration has not announced changes affecting group health plans, but key leadership positions are still being filled.

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In the very near future, we are likely to see regulatory action affecting the individual insurance market and, in some cases, the small-group market. This is the coverage that can be sold in the state Exchanges/federal Marketplace. HHS has released one proposed rule, which primarily takes steps to tighten enrollment rules and prevent the frequent turnover of individuals in individual market plans. For example, the proposed rule would shorten the open enrollment period for 2018 by half (ending on December 15, 2017, rather than January 31, 2018). The final rule has reached the last step in the regulatory clearance process and should be released soon.

A new website unveiled by HHS states that HHS is:

> going through every page of regulations and guidance related to the Affordable Care Act to determine whether or not they work for patients and whether or not they are making our health care system better.

This signals that additional regulatory actions can be expected.

How Sibson Can Help

Sibson will keep you informed about developments related to the Affordable Care Act. As always, plan sponsors should rely on legal counsel for authoritative advice on laws and regulations.

Questions?

If you have questions about the Affordable Care Act, please contact your Sibson consultant or the Sibson office nearest you.

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