HEALTH REFORM ADVISORY PRACTICE

Weekly Legislative Update

LOCKTON

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In 2009, as the Affordable Care Act (ACA) began to wind its way through Congress, Lockton's Health Reform Advisory Practice (HRAP) began a long-running weekly legislative update series to keep you apprised of significant legislative developments as they unfolded on Capitol Hill. With the winds of health reform change again blowing in Washington, we are reinitiating those weekly updates.

The Affordable Care Act: Quick Death or Long Sunset?

Comments by members of Congress and their aides indicate that while Republicans may pass legislation repealing the ACA in early 2017, the repeal might not actually be effective until 2020.

> ***Lockton comment:*** Does that mean the employer mandate and its related reporting would stay in place until 2020? It's not yet clear. It's entirely possible that repeal legislation could immediately do away with some provisions (e.g., the employer mandate) and delay rollback of other provisions (e.g., individual insurance policy subsidies). Until additional clarity is provided, we still believe it is best to maintain compliance efforts with respect to the employer mandate and its reporting obligations.

Delaying the effective date of the repeal would allow Republicans to keep their campaign promise of prompt repeal while also giving them time to develop a replacement plan, which they can introduce later.

Establishing a deferred date of death for the ACA might also pressure Democrats to support a replacement plan, to avoid appearing to be the party that prevented installation of a replacement as the ACA takes its last breath. And for their part, Republicans may want to appease some Democrats' concerns. While the GOP can repeal significant chunks of the ACA using the restrictive legislative process of reconciliation (requiring a mere 51 votes in the Senate, which the GOP currently has), it will not be able to achieve complete repeal or replacement without *some* Democrat support – enough to get to 60 Senate votes.

> ***Lockton comment:*** Republicans decried the use of reconciliation by Democrats to pass the ACA, and some Senate Republicans have expressed a desire to avoid using it to push through a replacement plan – both for political reasons (e.g., fear of being viewed as hypocritical) and to give them more flexibility in designing a replacement.

Not all Republicans are advocating early repeal and later replace. Influential Sen. Lamar Alexander (R-Tenn.) has been adamant that any repeal bill include replacement language –

"replace and repeal," as he says. The Republican Party's slim minority in the Senate means Mr. Alexander, along with two (and maybe only one) other Republican senator, could effectively prevent the passage of any repeal bill that doesn't include replacement provisions.

Changes Afoot for Small Employer Health Insurance Premium Reimbursements and Mental Health Parity

This week both the House and Senate passed versions of the 21st Century Cures Act. The Act is a $6.8 billion medical research funding bill, a bipartisan effort aimed at streamlining FDA approval of new therapies, funding new cancer research, and enhancing mental health treatment options. The House and Senate are expected to quickly reconcile minor differences in the versions passed by each and send the bill to the President for signature.

Of interest to employers, the bill includes leeway for small employers to reimburse employees' medical expenses (including premiums for coverage obtained elsewhere), and clarifies that coverage of eating disorders must comply with existing mental health parity rules.

Reimbursement of Individual Market Premiums

Prior to the ACA, it was common for small employers that didn't offer a group health plan to reimburse employees for some or all of the premiums they paid for individual health insurance policies. IRS regulations issued under the ACA effectively barred that practice after mid-2015. The new law, if enacted, would permit small employers not subject to the ACA's employer mandate, and not offering a group health plan, to reimburse employees on a tax-free basis up to $4,950 (self-only coverage) or $10,000 (family coverage) spent by the employee on medical care, including premiums. The new law would apply for 2017 and later years.

These "qualified small employer health reimbursement arrangements" must provide substantially the same benefit to all "eligible employees." Eligible employees include *every* employee of the employer, except new employees in a 90-day waiting period, employees under age 25, bargaining unit employees, part-time and seasonal employees, and non-resident aliens with no US-source income.

> ***Lockton comment:*** It appears a part-time employee for this purpose may be an employee whose customary weekly hours are 35 or less (25 or less is a safe harbor). A seasonal employee may be one whose customary annual employment is nine months or less (seven months or less is a safe harbor).

The arrangement must be funded solely by the employer, and the benefits become taxable to the employee if he or she is not enrolled in minimum essential coverage (MEC), or coverage adequate to avoid the ACA's individual mandate penalty. The law comes with a new notice obligation related to the arrangements, however. We will share more on all that in an Alert we will publish upon the law's enactment.

Mental Health Parity

The Act also includes provisions related to mental healthcare, building on provisions found in other mental health reform legislation that has been winding its way through Congress, and on past guidance released by federal authorities related to mental health parity compliance.

As currently written the Act requires health plans covering eating disorders comply with existing mental health parity rules with respect to coverage of the disorders. Essentially, the

Act clarifies that eating disorders are mental or nervous disorders as embraced by existing mental health parity requirements.

The legislation also requires joint action by the Departments of Labor (DOL), Treasury and Health and Human Services (HHS) to issue a compliance program guidance document. This document will provide illustrative examples of mental health parity compliance and noncompliance, with an emphasis on disclosure requirements and non-quantitative treatment limitations and descriptions of violations found in past investigations.

The Act emphasizes what we have been saying for some time: With strong bipartisan support, mental health reform will continue to garnish increased scrutiny by federal agencies. Employers and insurers need to continue efforts to ensure employee benefit plans are in compliance with mental health parity laws.

New Leadership for HHS and CMS

HHS is tasked with overseeing much of the healthcare and health insurance industries, including much of the ACA. It was expected that Mr. Trump would nominate an ACA detractor to head that agency, and he did so by appointing outspoken ACA critic Dr. Tom Price (R-Ga.). Rep. Price, a leader in shaping Congressional Republicans' replacement plans, will play a significant role in helping implement any repeal and replace legislation.

The Centers for Medicare & Medicaid Services (CMS), a division of HHS, administers Medicare and Medicaid, and oversees Healthcare.gov. Some Republicans in Congress (including Rep. Price) have pressed for the privatization of Medicare and more flexibility for states to manage their Medicaid programs. While Mr. Trump opposed privatization of Medicare on the campaign trail, his appointment of Seema Verma, architect of Indiana's unique Medicaid overhaul, indicates that Mr. Trump is serious about Medicaid changes.

Both appointees are expected to be approved by the Senate, even though the GOP does not hold a filibuster-proof majority there.

> ***Lockton comment:*** In 2013, Senate Democrats changed the Senate rules to allow approval of most presidential appointments upon a mere majority vote, rather than the 60 votes that had previously been required (60 votes are still required for approval of Supreme Court nominations and most legislative actions). Democrats might be regretting that rule change now, as they – the minority party in the Senate – are practically powerless to prevent confirmation of Mr. Trump's political nominees.

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