Dec. 16, 2016

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.

Swift Repeal of the ACA Remains the Talk of D.C.

Saying the first Senate vote of the new Congress will be to repeal the ACA, Senate Majority Leader Mitch McConnell has indicated that Senate Republicans plan to hit the ground running once the 115th Congress begins on Jan. 3, 2017.

Barring a special session, Dec. 16, 2016, is the last day of the current Congressional session. But the ensuing three weeks will not be all fun and games, as the incoming administration, key Congressional Republicans and their staffers will be diligently working to have repeal legislation ready for a swift vote once the new Congress opens for business.

Repeal Will Likely Happen Through "Reconciliation"

Most Congressional Democrats say they want nothing to do with an ACA repeal bill, which means Senate Republicans will have to resort to the filibuster-proof budget "reconciliation" process, requiring only 51 votes in the Senate, to push their repeal bill through.

> ***Lockton comment:*** The Republicans will hold 52 seats in the Senate in light of Republican John Kennedy's win last week in the runoff election for Louisiana's junior Senate seat.

The reconciliation process starts with both the Senate and House passing a budget resolution (budget resolutions can pass with a simple majority vote), which contains language providing for reconciliation. A swift budget resolution can set the stage for a repeal vote even before President-elect Donald Trump takes office on Jan. 20.

> ***Lockton comment:*** The repeal bill likely won't *replace* the ACA. Presumably,

> Republicans will pass a second budget resolution later this year for the 2018 budget. It is expected that such a resolution will also contain reconciliation instructions that the Republicans can, if necessary, use to later pass filibuster-proof replacement legislation.

What Exactly Gets Repealed Remains Less Clear…*Psssst: ACA Reporting Might Remain*

The reconciliation process can be used only to make changes to federal spending, revenue, and the debt limit. Democrats used the process in 2010 to pass the ACA, so some observers suggest that if reconciliation was used to *pass* an ACA provision, it can be used to *remove* it. That makes some sense, but the Senate parliamentarian – the Senate's referee – makes the determination whether a particular bill or provision in a bill is adequately related to the federal budget to be amenable to reconciliation. The rub might be that the Senate's current parliamentarian takes a narrower view of reconciliation than her predecessor in 2010.

Nonetheless, the vehicle for repeal will almost certainly be an ACA repeal bill proposed in 2015 by Rep. Tom Price (R-GA). You might remember that Dr. Price was recently nominated to be the next Secretary of the Department of Health and Human Services (HHS).

Price's bill cleared both houses of Congress but was vetoed by President Obama. The bill is heavy on repeal, but says little about replacement.

> ***Lockton comment:*** Price did lay out many replacement ideas in another bill he sponsored, the Empowering Patients First Act. While that legislation never made it out of committee, many are looking at it as a starting point for the ACA's replacement.

Among other things, Price's repeal bill effectively eliminates the individual and employer mandates by reducing the tax penalties to $0. The text of the bill makes the repeal retroactive, which would mean penalties for individuals and employers are waived, as if the ACA was never enacted. Price's bill also kills most ACA-related taxes, including the Cadillac tax and taxes on insurers.

Price's plan eliminates marketplace subsidies for lower income taxpayers buying individual policies there, but that repeal does *not* take effect until 2019. Importantly, Price's bill does *not* eliminate the employer reporting requirement (i.e., reporting on Forms 1094 and1095). Presumably, employer reporting remains to ensure subsidies do not go to individuals who are ineligible for them, like those with adequate coverage offers from their employer, or those enrolled in employer coverage.

> ***Lockton comment:*** There are some indications that, absent Congressional action repealing the employer reporting requirements, the incoming Trump administration will either simplify the requirements or establish a non-enforcement policy. It's too early to say what either approach would actually look like.

The Lack of Consensus on Replacement Might Slow Repeal

We previously wrote that some Congressional leaders are considering delaying the effective date of repeal until 2020. Some insurers, think tanks and pundits have suggested that the uncertainty inherent in a "repeal and delay" strategy could have catastrophic consequences for the already fragile individual market, a result no one is excited about.

The election provided Republicans with political capital to quickly move on repealing the ACA, but they recognize that bungling the repeal would quickly exhaust that capital. Sen. Chuck Schumer (D-NY), soon to be minority leader, has been quick to say that the Democrats will capitalize on any Republican misstep.

> ***Lockton comment:*** While indications are that Republicans are pushing hard to swiftly repeal the ACA, we expect their rhetoric on a quick repeal to change if the political risks outweigh the benefits of such action.

A longer path to repeal might not necessarily be a bad thing for Republicans. Though Democrats are committed to not voting for repeal, several Senate Democrats recently indicated a willingness to participate in replacement efforts. This is welcome news to Republicans who want to avoid appearing to take the same starkly partisan action with healthcare reform that they chided Democrats for taking with the ACA in 2010.

> ***Lockton comment:*** How motivated Democrats are to work with Republicans on a replacement plan is unclear, and is an issue affected by several factors. A repeal bill that defers the effective date for a couple years could put Democrats in the position, in 2018, of either cooperating on a replacement plan or being seen as the party that allowed the ACA to die without a replacement in place. A number of Senate Democrats are up for reelection in 2018 in states that went for Mr. Trump. The Democrats want desperately to protect those seats, and might conclude they can't afford to be cast as the party that wouldn't help put a replacement plan in place.

Modifying the Employee Tax Exclusion is a Common Theme of Replacement Ideas

Under the current Tax Code, employer-provided health insurance is a tax-free fringe benefit for employees, their spouses and their children (at least through age 26). This tax treatment is the single biggest tax expenditure of the federal government, bigger than other common income tax exclusions like the deduction for retirement savings, home mortgage interest and charitable contributions.

The tax treatment, on the employee's end, of employer-provided health insurance has long been a target of budget hawks, and a limit on the exclusion is commonplace in Republican proposals for ACA replacement. The specifics vary. For example, some plans tax employees on coverage values above certain thresholds and others tax high income earners on some or all of the coverage value.

Regardless of the specifics, each of the current proposals would result in a tax increase for both individuals and employers (by virtue of the employer's share of payroll taxes on the value of the coverage treated as taxable income to the employee).

> ***Lockton comment:*** The proposals for modifying the tax-free nature of employer-provided health insurance are similar in design to the ACA's Cadillac tax, which imposes a 40 percent excise tax on the value of health coverage that exceeds certain

thresholds. The Cadillac tax has been much maligned both in and outside of Congress. We anticipate that many of the same voices decrying the Cadillac tax will fight against changes to the tax-free treatment of employer-provided health insurance.

Look for the Administration to Fix the EEOC Wellness Plan Rules

We have been hopeful that any ACA repeal and replace legislation would also unwind the cumbersome wellness regulations finalized by the EEOC last May. Those rules, which diverged from similar long-standing wellness plan rules under HIPAA and the ACA, have caused all manner of challenges for employers.

Congress initially showed some appetite for providing a legislative fix; however, recent thinking is that the new Administration will take the lead in overturning the EEOC wellness regulations. President-elect Trump, and many of his cabinet nominees, are passionate about reducing the burden of federal regulations. Mr. Trump has indicated that his policy will be to eliminate two sets of regulations for every one new set that is issued. It appears the EEOC wellness regulations may be on the losing side of that equation, putting employers squarely on the winning side.

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