



HEALTH REFORM ADVISORY PRACTICE

Weekly Legislative Update



Jan. 20, 2017

Delay and Repair – Democrats' ACA Strategy Emerges

To date, Republican efforts to crack the Democrat caucus in Congress have been mostly unsuccessful. Democrats have pressed hard in Congress, in media and in the court of public opinion to stall the Republican repeal and replace effort in favor of a less invasive repair of the Affordable Care Act.

[Last week](#) we wrote about Republicans in Congress taking an important step toward repealing the ACA by passing a budget resolution allowing Republicans to repeal much of the ACA through the reconciliation process. The repeal effort continues to move forward. However, it is increasingly unlikely the Republicans will be able to meet the timeline they originally staked out – Jan. 27 for a repeal bill to be submitted to House and Senate Budget Committees and repeal legislation to be signed by Feb. 20.

Lockton comment: In football, a muddy field will often give an underdog a better chance to upset a faster, flashier team. The muddy conditions help keep the game close, so the underdog has a chance to win it in the end. Muddying things up appears to be the Democrat's strategy. With only 48 seats, Democrats don't have the votes in the Senate to reign in Republicans who have just enough votes to tackle much of the ACA without bipartisan support. There's still a lot of time on the clock, but it appears Democrats have sufficiently muddied things up to delay the Republican's preferred timeline. By delaying the Republican timeline, Democrats have more opportunities to build support for various ACA provisions and maybe even make gains in the 2018 mid-term elections. That's what Democrats hope anyway.

We're still hearing that a repeal bill will likely make it on newly inaugurated President Trump's desk by the end of March. Many key ACA provisions, such as individual subsidies and possibly employer reporting, might continue to apply before being phased out after two or three years. The expectation is the bill will include some replacement language, but a full replacement plan will not surface until late in the year.

Lockton comment: Last week Mr. Trump said ACA repeal and replacement legislation will come shortly after the Senate confirms Health and Human Services Secretary nominee Rep. Tom Price (R-GA). Democrats have already successfully extended the confirmation timeline and have more procedural plays to create further delays in Price's confirmation. Dr. Price had a warm up confirmation hearing this week and is expected to have his official confirmation hearing in front of the Senate Finance Committee Jan. 24. Further delays to Dr. Price's confirmation may extend the ACA repeal and replace timeline even more.

Disorder in the Court of Public Opinion

The legislative battle to repeal and replace the ACA may have only just begun, but the trial in the court of public opinion is well under way.

Lockton comment: In politics, as in philosophy, perception is easily construed to be reality. Think back to the ACA-related "death panels" hysteria in the summer of 2009. Public outcry sent Democrats in Congress scrambling to visit their constituents during Congress's summer recess to debunk the mythical panels that would decide whether grandma or pop-pop lived or died.

The nonpartisan Congressional Budget Office (CBO), tasked with providing Congress with analyses to assist in economic and budgeting decisions, is often caught in the middle of this fight because it's an easy foil. Elected officials on both sides of the aisle exploit the CBO to estimate the cost of certain legislative approaches – sometimes even telling the CBO what it is allowed to assume and what it isn't. The CBO dutifully issues a report, which usually reflects a result the requesting party was hoping to see, and the report is then held up to underscore the position advanced by that party.

Such was the case this week when, at the request of Senate Minority Leader Chuck Schumer (D-NY), the CBO issued a report indicating that if the ACA were repealed, 18 million people would lose coverage in the first year, and more than 30 million would lose coverage over the coming decade.

The CBO was quick to point out it's difficult to make anything close to precise projections, and Congressional Republicans were equally quick to point out the analysis assumed nothing would replace the ACA. "This report assumes a situation that simply doesn't exist and that no one in Congress advocates," said Senate Majority Leader Mitch McConnell (R-KY). And so it goes.

"And in Other (Fake) News ..."

"Fake news" in social media has begun to play a prominent role in the ACA repeal and replace debate. Last weekend an authoritative-looking report on Facebook warned the American public the Senate had just voted to eliminate the ban on pre-existing condition restrictions and the mandate compelling coverage of children to age 26. The story triggered a great many angry emojis!

Of course, nothing of the sort had occurred. As previously discussed, last week the Senate passed a budget resolution – a procedural maneuver without much substance – directing committees to prepare legislative language that might be used to repeal portions of the ACA, but before coming to any vote those committees would need to report their legislative language, see it placed into a bill and have it survive the markup process before it would even come to an actual vote.

Lockton comment: It is true, some Republican replacement plans do eliminate the age 26 mandate and modify the prohibition on pre-existing conditions exclusions, however, those requirements boast broad support and have pretty good chances at surviving. Enough support, in fact, Dr. Price stated during his first confirmation hearing that he left the age 26 mandate out of his proposed replacement plan because “[t]he insurance companies had said that they were including that in their plans going forward, so we felt that was covered.” Dr. Price’s comments probably don’t amount to “fake news,” but reports have indicated carriers may not be as accommodating to such a provision as Dr. Price suggested.

"And in Other (Real) News ..."

Today is the first day of the Trump presidency. It always takes time for the dust to settle after a presidential transition, so we will have to wait to know exactly what a Trump presidency means – for healthcare and otherwise. What we do know is Mr. Trump has prioritized a shakeup of the ACA and the pharmaceutical industry.

As recently as last weekend, Mr. Trump stated he is nearing completion of a plan to replace the ACA and vowed he would provide a plan offering “insurance for everybody.” Mr. Trump’s apparent advancement of a universal healthcare policy appears to be in direct contradiction with longstanding GOP views decrying the federal government’s over-involvement in healthcare.

Mr. Trump has since backed away from his universal healthcare comments; instead, he has focused on a message of ensuring everyone has *access* to coverage, which is more in line with the Republican’s traditional position on healthcare.

Lockton comment: At first blush, Trump’s comments suggest there might be a disconnect between he and the Republican leaders in Congress who initially pushed for clean repeal legislation without any, or only limited, replacement language. Such a disconnect only further muddies the repeal and replace efforts. When looking more closely, however, it is becoming clearer that Mr. Trump and most Republicans actually agree on the broad principles for change – such as, a smooth transition with few disruptions, state innovation, increased competition and access to numerous coverage options. Any disconnect seems to center on strategy and specifics. The process of working out the strategy and specifics is messy, but the broad philosophical agreement makes it more likely that Republicans are able to continue to advance the ball.

Additionally, Mr. Trump reiterated he is serious about addressing escalating pharmaceutical prices. He vowed to bring public pressure on pharmaceutical manufacturers “just like on the

airplane,” likely referring to his previous comments about the costs of the F-35 fighter jets or the revamped Air Force One.

More Clarity to Come Next Week?

Starting next Wednesday, Republicans will be holding a retreat in Philadelphia. In addition to Mr. Trump and Vice President Pence, most Congressional Republicans are expected to be in attendance.

The retreat coincides with recent announcements by Mr. Trump and several senators (e.g., Sens. Rand Paul (R-KY), Bill Cassidy (R-LA) and Susan Collins (R-ME)) that details on their ACA replacement proposals are forthcoming. It remains unclear whether these proposals are merely principles or actual legislation. Regardless, Republicans will have plenty to talk about, and it seems likely, to us anyway, Republicans will emerge from these meetings with an increasingly unified game plan for repealing and replacing the ACA.

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