CORPORATE SYNERGIES®

compliance ALERT

Executive Order Directs Agencies to Relax ACA Requirements; Trump Administration Ends ACA CSR Payments to Insurers

October 16, 2017

On October 12, President Trump signed an executive order ("the Order") that directs agencies of the federal government to propose new rules, or revise existing rules, in order to relax the Affordable Care Act (ACA) requirements for employers and individuals pertaining to association health plans (AHPs), short-term, limited duration insurance (STLDI) and health reimbursement arrangements (HRAs).

While the Order does not repeal the ACA, nor immediately change current law, it does explain the new direction that this administration wants to take when it comes to enforcing the ACA and regulating health insurance markets. This new direction is focused on increasing health plan options on the market and lowering premium costs for both small businesses and individuals. The Order coincides with several other ACA-related actions by President Trump and the agencies, which are discussed below.

Association Health Plans

Since the early days of President Trump's campaign, he has championed the cause of making it easier to buy insurance across state lines. One way the Order tries to achieve this goal is by promoting AHPs, which are plans that allow different employer groups to join together into one larger health plan in order to lower costs by spreading risks and administrative costs to a larger pool of insurable individuals. Specifically, the Order provides that, within 60 days, the Secretary of Labor "shall consider" proposing regulations or revising guidance, consistent with current law, to "expand access to health coverage by allowing more employers to form AHPs."

The Order then directs the Secretary to consider ways to relax the requirements that must be met in order for different employers to be considered a "single employer" under the Employee Retirement Income Security Act of 1974 (ERISA), and to consider ways to promote AHP formation on the basis of employers linked by common geography or industry.

The primary goal of the AHP-related provisions of the Order appears to be to make it easier for small employer plans to qualify as members of AHPs in order to allow such plans to be considered "large group health plans" under the ACA. This would help such plans avoid costly regulatory requirements applicable to small plans under the ACA's small group market rules, such as rating factor rules and metal-level value requirements. Such cost savings would add to the cost savings such plans already achieve by being able to more easily spread risk and costs among the larger pool of insurable individuals.

Short-Term Coverage

Section 3 of the Order deals with STLDI coverage, which is commonly referred to as "short-term coverage." The Order directs, within 60 days, the Secretaries of the Treasury, DOL and HHS to consider proposing regulations or revising guidance, to expand the availability of STLDI coverage.

As background, short-term coverage has historically been used to provide coverage for individuals in coverage gaps, for example, for individuals who are between school and a job. Additionally, it may be useful to people who want a broader choice of insurers or provider networks than what is available on the Exchanges.

Short-term coverage is exempt from HIPAA, the ACA and state insurance law requirements. Accordingly, short-term coverage is not subject to the ACA's guaranteed issue and guaranteed renewal requirements; age rating and cost-sharing limitations; prohibitions on health status underwriting, annual and lifetime limits, preexisting condition exclusion clauses; essential health benefit requirements; or any other ACA consumer protections.

However, one important limitation of short-term coverage under the ACA is that an individual who only has short-term coverage, and not some other form of ACA-compliant coverage, would be out of compliance with the ACA's individual mandate requirement and may have to pay a penalty for noncompliance.

SYNOPSIS

While the Order does not repeal the Affordable Care Act or immediately change current law, it explains the direction that this administration wants to take when it comes to enforcing the ACA and regulating health insurance markets.

In 2016, the DOL, Treasury and HHS issued regulations limiting short-term coverage to a period of less than three months (it was originally permitted for a period of less than 12 months). This change was designed to be in accordance with the time period that individuals can remain without coverage without having to pay the ACA's individual mandate penalty. These regulations also provided that the less-than-three-month limit applies to any extensions – this was intended to keep insurers from indefinitely extending short-term coverage.[1] In June of this year, a group of Republican Senators asked the Trump Administration to return to the prior definition, and this Order reflects the intent to make that change.

Health Reimbursement Arrangements

Section 4 of the Order directs the agencies, within 120 days, to consider proposing regulations or revising guidance, to "increase the usability of HRAs, to expand employers' ability to offer HRAs to their employees, and to allow HRAs to be used in conjunction with nongroup coverage."

While this language could allow for regulations permitting more generous funding of HRAs, its primary intent appears to be to allow the use of HRAs to reimburse premiums in the individual market, something that is not currently permitted under the ACA.

As background, while HRAs are not explicitly mentioned in the text of the ACA statute, the IRS, in collaboration with the DOL and HHS, have issued regulations and guidance requiring HRAs to comply with ACA group health plan requirements. As a result, HRAs are generally prohibited from reimbursing premiums of employees obtaining coverage on the individual market and the Exchanges. While there are some narrow exceptions to this rule, including an exception for qualified small employer health reimbursement arrangements (QSEHRAs), these exceptions were drafted narrowly in order to avoid the problem of having employers dump unhealthy workers into the Exchanges, as this would likely degrade the risk pool of the Exchanges.

Elimination of CSR Payments

In a related development, on October 12, the Trump Administration and HHS announced that ACA cost-sharing reduction payments to insurers ("CSR payments") will be terminated, effective immediately.

As background, the ACA requires insurers to reduce cost-sharing for eligible, low-income individuals enrolled in silver plans through the Exchanges. This financial assistance is provided by these CSR payments, and is in addition to the ACA premium tax credits that individuals can qualify for.

This decision primarily affects insurers who will no longer be reimbursed for the CSRs, but who are required by law to offer them to eligible individuals buying insurance on the Exchanges. As a result, low-income individuals will instead receive a higher ACA premium tax credit, which will cover the cost of their lost CSR subsidy, and therefore, such individuals will not see any impact to the cost of their coverage. However, the termination of the CSR payments will likely result in an increase in the cost of premiums for silver plans in some states and additional insurers exiting Exchanges.

Expansion of Exemption for Covering Contraceptive Services

On October 6, the DOL, HHS, and IRS jointly issued two sets of interim final regulations designed to expand the current exemption to the ACA's requirement to provide contraceptive coverage and services to participants in their plans.

Under the new rules, employers are permitted to exclude coverage for contraceptive services based on moral or religious objections.

One of the regulations expands the exemption on the grounds of sincerely held religious beliefs, and the other expands the exemption on the basis of sincerely held moral convictions.

Under these new rules, employers are permitted to exclude coverage for contraceptive services based on moral or religious objections. This is in addition to the exemptions already outlined under the ACA for closely-held for-profit corporations, religious non-profit organizations and religious employers (for example, churches).

The "religious beliefs" exemption covers churches; nonprofit entities; and for-profit entities, whether or not closely held, including publicly traded entities. The "moral convictions" exemption is available to these same entities, but not to publicly-traded entities, although the agencies are seeking comments on whether the exemption should be expanded further to encompass a broader range of for-profit entities.

In addition, employers with religious or moral objections are no longer required to go through the normal accommodation process for the waiver, which requires them to submit a self-certification of their objections to their insurance carrier or file a notice with HHS – a process that enabled cost-sharing responsibility to be passed to the plan's issuer or third-party administrator (TPA).

Notably, as a result of this accommodation becoming optional, it is now possible that costs for contraceptive services may not be covered, since the full financial responsibility of contraceptive services can be passed to a member. However, employers are likely to pass this cost on to the insurance carrier or TPA. The regulations also allow for a mechanism by which willing employers (or insurers) may (but are not required to) allow objecting individuals to obtain health coverage without some or all contraceptive coverage in accordance with the individual's sincerely held religious beliefs or moral convictions.

While entities eligible for an exemption are not subject to any new notice requirements, group health plans must take into consideration existing ERISA plan documentation and disclosure rules, including the requirements to specify coverage details in the plan document and summary plan description, and to disclose reductions in covered services.

[1] These regulations also required that insurance contracts for the STLDI coverage, and all application materials connected with enrollment, prominently display a warning stating that the short-term coverage did not satisfy the individual mandate coverage requirement.

How Does the Executive Order Affect Employers?

Small employers that have had difficulty finding affordable coverage for their employees will likely benefit from the flexibility and cost savings that the new and revised rules will provide once they go into effect.

However, from the perspective of most employers, the impact or effect of the Order will not be significant because: (i) the Order, particularly its provisions pertaining to AHPs and HRAs, may still take a long time before actually taking effect; most of the new rules contemplated will likely not be effective until 2019 at the earliest,[2] and by the time some of the rules become effective, a new administration may be in place with different priorities; (ii) the Order appears to be directed at several legal changes that, under the U.S. Constitution, must be changed by Congress, and not by agency rulemaking, and therefore, the new rules contemplated will likely face numerous legal challenges; and (iii) the Order's provisions pertaining to short-term coverage provide an incentive for healthy, young individuals and employees (who do not need comprehensive coverage) to leave the Exchanges, and for longer periods of time. While this may impact the long-term viability of the Exchanges, it is not likely to have a significant impact on employer-sponsored coverage.

How Do These Other ACA-Related Developments Affect Employers?

The elimination of the CSR payments should not have any significant impact on employer-sponsored health insurance coverage.

The expansion of the exemption of the ACA's contraceptive coverage mandate is considered to be a significant change by employers with sincerely held religious and moral objections to the rule, particularly those that have been challenging the ACA's accommodation process in the courts. However, the new rules are likely to start even more litigation, and numerous legal challenges to these rules are expected (a lawsuit has already been filed by Washington State,[3] for example). From a compliance perspective, it's important for plan sponsors to remember to update plan documents and SPDs to account for reductions in coverage like these.

It is important to remember that the ACA has not been repealed by this Order.

What Should Employers Do Next?

It is important to remember that the ACA has not been repealed by this Order. As discussed above, the ACA remains the law of the land, and the Order functions merely as a directive to the agencies to write and revise rules.

Under the Administrative Procedure Act, these agencies will first have to publish proposed rules and then collect and respond to public comments before issuing new rules in final form. Even under an expedited process, this will take several months. At the earliest, such new rules could only become effective by mid-year 2018, and most will not become effective until 2019 or later. Accordingly, since no laws or rules have been changed yet, and will not be changed for quite some time, there is nothing that employers need to do now.

If you have any additional questions, please call your Corporate Synergies Account Manager or 866.CSG.1719.

[2] AHPs are regulated as multiple employer welfare arrangements (MEWAs), and thus, are regulated by both federal and state law. Accordingly, with respect to AHPs, it will likely take a long time to change rules pertaining to them.

[3] Complaint, *State of Washington v. Trump*, No. 2:17-cv-01510 (W.D. Wash. Oct. 9, 2017).