

President Biden Signs Executive Orders Expanding Access to Health Coverage

February 1, 2021

On January 28, 2021, President Joe Biden signed [two executive actions](#) designed to expand access and equality of access to health insurance coverage through both government Exchanges and private plans. These included an [Executive Order](#) aimed at expanding access to enrollment in Exchange plans and Medicaid plans and a [Memorandum](#) that rescinds the prior administration's policies on reproductive healthcare to make it easier for more individuals to access such care. Upon signing these new executive actions, the President remarked that these actions were designed to restore important provisions of the Affordable Care Act (ACA) that had been altered during the Trump administration.

The administration intends these new executive actions to complement other Executive Orders signed earlier in the week by President Biden that will likely also have a considerable impact on health plans (both on and off the Exchanges), including Executive Orders pertaining to the [public health](#) and [economic responses](#) to the pandemic, and [LGBTQ nondiscrimination](#).

How do these new executive orders and actions change the law for employers and sponsors of health insurance?

Executive Orders cannot change existing law, but they can direct federal agencies to

draft new rules or guidance consistent with the Biden administration's healthcare policy priorities – policies which are considerably different from the prior administration. These policies seek to increase access and equality of access to healthcare for many more individuals, and to roll back rules and policy actions made by the Trump administration.

Specifically, the Executive Order on increasing access to healthcare revokes President Trump's very first [Executive Order](#), which stated that the policy of his administration was to seek repeal of the ACA, minimize its burdens, waive its requirements and provide states with additional compliance flexibility. This new Executive Order also revokes an October 2017 [Executive Order](#) that directed federal agencies to expand access to short-term limited-duration insurance plans, association health plans and certain health reimbursement arrangements.

Accordingly, while these executive actions don't directly impact employers and sponsors of health insurance, they could have an indirect impact, since they could potentially result in new rules that increase employers' potential exposure to penalties under the ACA, Title VII of the Civil Rights Act of 1964 (Title VII) and other employee benefits and employment laws.

SYNOPSIS

- President Joe Biden signed two executive actions to encourage expanded access, and equality of access, to health insurance coverage.
- These actions could result in new rules that increase employers' potential exposure to penalties under the ACA and other laws.
- There are no specific actions needed immediately, but employers should review their health plans to ensure coverage meets the ACA's minimum standards and does not discriminate on the basis of sexual orientation or gender identity.

How do these new executive orders expand health coverage access and equality of access?

President Biden's Executive Order on healthcare access is focused on increasing access to Exchange coverage. As a part of this order, the U.S. Department of Health and Human Services (HHS) will open a special enrollment period on the Exchanges from February 15 through May 15 of this year intended to ease enrollment restrictions due to the "exceptional circumstances" caused by the continuing COVID-19 pandemic.

Additionally, this Executive Order directs federal agencies to reconsider rules and policies that could limit Americans' access to healthcare. Specifically, these agencies are directed to reexamine:

- Policies that undermine protections for people with preexisting conditions, including complications related to COVID-19;
- Demonstrations and waivers under Medicaid and the ACA that may reduce coverage or undermine the programs, including work requirements;
- Policies that undermine the government's health insurance Exchanges or other markets for health insurance;
- Policies that make it more difficult to enroll in Medicaid and the ACA; and
- Policies that reduce affordability of coverage or financial assistance, including for dependents (While it's not entirely clear, this last part of the Executive Order has been interpreted as a directive to Treasury to issue regulations extending ACA subsidies to family members of low-income workers who currently do not qualify for subsidized ACA coverage.).

President Biden's Memorandum on reproductive health access rescinds the prior administration's policies referred to as the "Mexico City Policy" or "global gag rule." That rule barred international non-profits that provide abortion counseling or referrals from receiving funding from the U.S. government. In addition, this Memorandum asks HHS to consider rescinding domestic rules under its Title X family planning program, which prohibits certain clinics from receiving federal funds for abortion-related services.

President Biden's Executive Order on LGBTQ nondiscrimination, issued on his first day in office, was designed to ensure equality of access to health insurance by maintaining and ensuring compliance with federal rules under Title VII prohibiting employers from discriminating on the basis of sexual orientation and gender identity with regard to employee benefits and other terms and conditions of

employment (see our eAlert on this topic [here](#)). More specifically, this Executive Order ensures that the government agencies issue health insurance-related rules and regulations that comply with the Supreme Court's recent decision prohibiting employers from engaging in discrimination in benefits and other terms and conditions of employment on the basis of sexual orientation or gender identity. This Executive Order will likely result in the agencies revising the HHS nondiscrimination rule under Section 1557 of the ACA (discussed in more detail [here](#)).

In the Executive Order focused on the public health response to the pandemic, President Biden directs the agencies to formulate a national COVID-19 testing and public health workforce strategy, including directives for federal officials to act to facilitate free testing for the uninsured and to clarify insurers' obligations to cover COVID-19 testing, among other actions. As a result of this Executive Order, government agencies are likely to reverse Trump-era guidance providing that employers and insurers do not have to pay for COVID-19 tests when not used for diagnostic purposes (such as back-to-work or general screening tests).

What impact could these executive actions have on employers and plan sponsors under the ACA?

These executive actions make it easier for many more (likely many millions more) Americans to get access to coverage on ACA Exchanges, and while this doesn't directly impact employers and plan sponsors, it could potentially mean higher penalties under the ACA's Employer Mandate for employers offering coverage that doesn't meet the ACA's minimum standards.

Under current ACA rules, employers offering coverage that falls below the ACA's standards aren't subject to penalties unless employees have enrolled in Exchange coverage. If millions more Americans enroll in Exchange coverage due to these executive orders, and if their employers haven't been offering appropriate coverage, the penalties against such employers could increase substantially.

How do the other new executive orders, including the one on LGBTQ nondiscrimination, impact health plans? Do these new orders require our plan to offer gender transition services or similar services?

President Biden's LGBTQ nondiscrimination order preserves the status quo with respect to discrimination in benefits on the basis of sexual orientation, that is, its primary goal is to ensure that the federal agencies follow the law as it is currently written. The order does not require health plans to offer gender transition services or similar services, or any new services at all for that matter.

The Executive Order focused on a national COVID-19 testing

and public health workforce strategy seeks to increase uniformity of rules and regulations on the pandemic response, which many employers and plan sponsors operating in several jurisdictions will likely welcome. Additionally, the directive to clarify confusing rules and regulations on COVID-19 testing and care will also likely be welcomed by employers and plan sponsors, as these rules have caused employees and health plan participants considerable confusion.

What should employers and plan sponsors do next?

There are no specific actions that employers and plan sponsors need to do immediately in response to these recent executive actions, but in light of the increased potential for penalties that comes with these new directives under the ACA, Title VII, and other laws, employers should review their health plans to ensure that the coverage meets the ACA's affordability requirement and other minimum standards. While there is no requirement to offer new types of coverage, the plans' offerings should be reviewed to ensure that they do not discriminate on the basis of sexual orientation or gender identity.

**If you have any additional questions,
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