The Impact of the Election on Employer Sponsored Health Benefits

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The results of the 2016 election will obviously have a significant impact on employer sponsored benefits. In the short time since the election, much has already been written about how the governmental shift could affect a wide range of public policies. This issue brief, however, will focus only on employer sponsored health and welfare benefits, and specifically on parts of the Affordable Care Act (ACA) that directly affect employers. We will not address the many other healthcare-related issues such as Medicare, provider reimbursements, changes to prescription drug rules, etc., to which changes are also likely.

How Can Changes Be Made?

With control of Congress and the White House, Republicans are in a position to make significant changes to ACA and other benefit-related laws. However, immediate repeal of the ACA is not technically possible. Changes to regulations take time, and some changes would require Congress to pass new laws. Although Republicans control Congress, they do not hold a 60-seat supermajority in the Senate. Democrats are likely to use the filibuster to block complete repeal and other attempts to make major changes to the law.

Even with the filibuster threat, the Republicans in the Senate can use the process known as budget reconciliation to make significant changes to the law. A budget reconciliation bill only requires a 51-vote majority to pass, but is supposed to be used only for legislation that affects government revenues and expenditures. Remember that the Democrats used the budget reconciliation process to make the final changes necessary to pass the ACA in 2010.

Additional modifications can be made by the administration through the regulatory process without any action being taken by Congress. The new President appoints the leadership of the government agencies responsible for regulations, guidance, and enforcement of the current law. Changes to existing regulations can take some time to draft, publish for comments, revise, and adopt. However, other types of regulatory guidance can be changed more quickly. For example, the current prohibition on employers paying for individual coverage is dependent on informal guidance, and final regulations have not yet been published.

Finally, the administration may simply choose not to enforce some existing rules. Employers should monitor the situation closely, but since most changes will take some time, employers should not expect immediate relief from most current requirements and should continue to comply with existing rules until they are changed.

Recent Republican Initiatives

It would be impossible to predict exactly what Congress and President-elect Trump will do. There are, however, recent Republican initiatives that give some idea about what to expect.

<u>The Ryan Plan</u>

Earlier this year, Speaker of the House Paul Ryan released an outline of the House Republicans' healthcare-related priorities. The plan proposes to retain a number of elements of the ACA, including restricting pre-existing limitations, prohibiting insurance companies from rescinding coverage, and allowing coverage on parents' plans for adult children to age 26. Examples of some of the significant changes to the ACA proposed in the plan include:

- The elimination of Medicaid expansion, to be replaced by block grants to states.
- Repeal of the "Cadillac" tax, replaced by a limit on the amount of benefits employers can provide to employees on a tax-free basis.
- Elimination of ACA income-based subsidies for purchase of individual health insurance, replaced by an age-based tax credit for those without access to employer sponsored insurance.
- Allowing employers to pay for individual health insurance premiums for employees.
- New rules that would make it easier for small employers to join together in pools to provide insurance to employees.

More detail on Ryan's plan can be found at:
http://abetterway.speaker.gov/_assets/pdf/ABetterWay-HealthCare-PolicyPaper.pdf

<u>2015 Republican Budget Reconciliation ACA Repeal Legislation</u>
In 2015 Republicans passed legislation to repeal portions the ACA; that legislation was vetoed by President Obama. Portions of this legislation had bi-partisan support. The legislation was designed to be approved using the budget reconciliation process described above, so it could serve as a road map for what Republican legislators may attempt to do in 2017. The legislation included:

- Repeal of tax credits for those who purchase individual health insurance. These tax credits would be phased out over two years.
- Repeal of the small business tax credit that provides a tax credit to some small businesses for the purchase of group insurance for their employees.
- Repeal of the individual mandate.
- Repeal of the employer shared responsibility rules.
- Repeal of Medicaid expansion.
- Repeal of medical device tax, health insurance tax imposed on health insurance companies, the "Cadillac" tax, and the payroll tax increase imposed on individuals making over $250,000.

The 2015 legislation did not address how Congress would deal with the loss of revenue from the repeal of revenue-generating provisions of the ACA. One of the issues Republicans will need to address is the stability of the individual health insurance market. Repealing the individual mandate, and eliminating subsidies for those purchasing individual plans while still requiring insurance companies to cover anyone regardless of pre-existing conditions, will further destabilize the individual health insurance market and likely lead to more insurance companies pulling out of that market.

<u>Other Possible Changes</u>
- Both Ryan's plan and President-elect Trump have proposed the expansion of health saving accounts (HSAs).
- The future of small-group insurance rules is also very unclear, but changes to current community rating rules for small-group plans are likely. Republicans have proposed allowing insurance companies to sell policies "across state lines." In theory, this change would increase competition and lower insurance rates. The actual market results of this policy are unclear. Three states already allow out-of-state carriers to sell in-state, and no new carriers have entered any of those states. However, if this policy were adopted on a nationwide scale, large national insurers might be able to take advantage of this flexibility and more easily expand coverage into new areas. This shift would also likely drive further consolidation in the health insurance industry. In any case, states will likely retain some authority over group insurance rules, so changes at the federal level may result in more variability in small-group plans from state to state.

Potential Impact of Possible Change on Employers
In this final section, we consider what effect some of the more significant changes could have on employers.

Elimination of Employer Shared Responsibility Rules
Elimination of the §4980H shared responsibility rules would obviously be welcomed by most large employers (those with 50 or more FTEs). These rules are extremely complex, and many employers have struggled to comply with them. How many employers would make significant changes to the benefits would likely mirror in reverse what happened as the rules went into force. As the ACA was implemented, many large employers who already offered relatively comprehensive benefits did not need to make very many fundamental changes to their plans. For these employers, the shared responsibility rules created an additional administrative burden and some cost impact, but did not cause them to make a major strategic shift in employee benefit strategies.

On the other hand, some employers who have many variable-hour, low-wage, high-turnover employees, and who historically did not offer strong benefit packages, have struggled to implement the changes necessary to comply with the ACA. Employers in industries such as retail, hospitality, and staffing, and those with a large number of low-wage workers, are most likely to take advantage of a repeal and cut back on coverage offered to some employees. Changes to the ACA may also result in a resurgence of voluntary benefits and "mini-med"-type programs that existed prior to the ACA.

Employer Reporting
It is virtually impossible for the new administration or Congress to change current reporting employer requirements for 2016. Employers who are subject to the reporting requirement should continue to work to complete the 2016 reporting by the current deadlines.

Also note that if the shared responsibility rules were eliminated, it would not automatically mean a quick end to employer reporting. The IRS uses employer reporting data for more than just the employer shared responsibility rules; employer reporting data is also used by the IRS for administration of the individual mandate, and to determine eligibility for tax credits for those who purchase individual health insurance. As mentioned above, recent proposals to eliminate those tax credits outline a two-year period for the transition. If this is the case, the IRS will need to continue to collect data. Employer reporting may change, but it is not likely to go away for a while.

Rollback of Medicaid Expansion
As mentioned above, elimination of the ACA Medicaid expansion is a high priority for Republicans. Although this issue may not seem to be directly related to employer sponsored plans, it could have a significant impact on employers who have many low-wage workers in states that have expanded Medicaid under the ACA. Many of these employers have benefited financially from Medicaid-eligible employees' getting their coverage through the Medicaid system instead of enrolling on the employer's plan. Depending on how each state handles this transition, employers may need to rethink this strategy.

Small Employer Changes
Proposed changes such as allowing employers to pay for individual health insurance, setting up new group pooling rules, and allowing carriers to sell across state lines could create more flexibility and new options for small employers. How these changes are implemented, and importantly, how they affect carriers offering small-group plans, will determine the extent of the effect they will have on actual group health insurance costs.

Changes to How Employee Benefits Are Treated for Tax Purposes
Undoubtedly, one of the biggest question employers face is exactly what Republicans will do regarding the tax treatment of employer sponsored benefits. Currently, the fact that most healthcare-related benefits can be provided tax free is a significant driver of how employers treat these benefits in their compensation strategies. Tax-free employee benefits are also the single largest source of lost revenue for the federal

government, making it a clear and easy target for policy makers looking for additional revenue sources. A significant reduction in the amount of employee benefits that can be provided tax free could cause employers to rethink their entire approach to employee compensation.

Summary

Significant change is a given. How quickly it will take place and what exactly will change have yet to be determined. It is important that employers refrain from assuming anything and stay the course for at least the next few months. It goes without saying that 2017 is going to be a busy year for employee benefits professionals, HR managers, and corporate leadership.

LISI and our team of expert sales advisors will keep you up to date as our landscape continues to change. Fasten your seatbelts and stay tuned!