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Times Are a-Changing for Employers

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Employers face uncertainty with respect to healthcare reform under the incoming administration. This article considers the changing landscape for healthcare reform and federal regulations, including overtime rules.

During his campaign, President-Elect Donald Trump promised that one of his first acts would be to repeal and replace the Affordable Care Act (the "ACA").¹ The GOP, holding a majority in both chambers of Congress, appears ready to assist. Several years after the ACA's enactment, employers now wonder how these proposed changes may affect their businesses.

Policy Specifics

When the new 115th Congress convenes on January 3, 2017, one of its first objectives will be to address the ACA. Indeed, on November 20, 2016, Vice President-Elect Mike Pence noted that Trump will prioritize repealing President Barack Obama's landmark health care law right "out of the gate" once he takes office. But enacting complex legislation necessary to address the ACA, while protecting

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¹ The Patient Protection and Affordable Care Act, P.L. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, P.L. 111-152. For a discussion that speculates on the structure and design of potential healthcare reform, with a focus on tax law changes, see Monica Coakley and Lori Robbins, "[What Does the Future Hold for the Tax Provisions of the Affordable Care Act?](#)" What's News in Tax (Nov. 29, 2016).

millions of Americans who depend on it for coverage, is a daunting task. A number of proposals have been made for possible replacement of the ACA, and the shape of final legislation at this stage is difficult to discern.

Let's consider what we know. As of this writing, Trump campaigned on a number of goals related to the ACA, four of them aimed at lowering consumer costs: (1) allowing the sale of insurance across state lines, (2) increasing access to health savings accounts ("HSAs"), (3) requiring price transparency from service providers, and (4) allowing consumers to import medicine from abroad.

In the days after the election, Trump indicated in a November 11 interview with the *Wall Street Journal* that he was open to leaving in place two of the ACA's most popular provisions: protecting those with pre-existing conditions and allowing young adults up to age 26 to remain on their parents' health plans.

However, these are goals, and absent are details on how they would be accomplished. As a result, Speaker of the House Paul Ryan's *A Better Way* plan, which does propose a number of specific actions, may provide a blueprint of GOP and White House ACA replacement policies. In addition, Representative Tom Price, one of the drafters of *A Better Way*, is anticipated to become the secretary of Health and Human Services. *A Better Way* generally proposes the following:

- Increased access to HSAs
- The use of high-risk, state-run pools for the unhealthiest individuals
- Expanded pooling opportunities for small businesses
- Age-based premiums with higher rates for older individuals
- Changes to Medicare and Medicaid
- Limits to the amount of employer-provided health care that can be excluded from income
- Deductions for health care premiums paid by individuals
- A new refundable tax credit for individuals without employer-provided insurance
- The *Better Way* plan keeps the pre-existing conditions protections and coverage for young adults up to age 26.

Procedural Mechanics

Once details of a replacement proposal are formulated, how will legislation be passed? Although the GOP holds a substantial majority in the new House, 240-194, the majority is much narrower in the Senate, 51-48, with one seat to be determined in a December 10 run-off. To bring legislation up for a vote in the Senate over a filibuster, a 60 vote majority is required. However, the GOP leadership has indicated it might use a procedural mechanism known as "budget reconciliation." Budget reconciliation, created by statute in 1974, is an expedited process used for certain tax, spending, and debt limit bills.

Legislation considered under this procedure cannot be filibustered in the Senate and requires only a simple majority for passage. This is the same procedure that was used to pass amendments to the ACA in 2010. One important limitation of the budget reconciliation procedure is that any provision of legislation that does not have more than an incidental effect on revenue is subject to a point of order, and 60 votes would still be required. Therefore, some aspects of the ACA may be modified or repealed through the reconciliation process, such as the individual and employer mandate penalties, the Cadillac tax, reinsurance, and Patient-Centered Outcomes Research Institute fees. Other ACA features, such as the elimination of annual or lifetime limits on coverage, may not and could require a 60 vote majority.

Practically, the effect on the insurance market of elimination of the individual and employer mandates would call into question the continued viability of the exchanges. Elimination of the individual and employer mandates would also eliminate the need for reporting on Forms 1094 and 1095 when the information is provided solely for purposes of enforcing these mandates.

The Fair Labor Standards Act (“FLSA”)

The FLSA establishes the federal minimum wage and overtime requirements. Currently, the regulations generally mandate that employees working in excess of forty hours per week are paid overtime at a rate of 1.5 times their regular wage unless they are classified as “exempt” under a two-part test based on the employee’s specific job duties and a salary threshold (currently \$23,660). The rules were recently revised for the first time in over a decade through Department of Labor regulations (scheduled to be effective December 1, 2016) that, among other things, increase the salary threshold to a standard salary level of \$47,476, or the 40th percentile of weekly earnings for full-time, salaried workers in the lowest wage Census Region (currently the South). As a result of this higher salary threshold, it has been estimated that this shift will cause at least 4.2 million employees who are currently classified as exempt to be at risk of becoming non-exempt.

Twenty-one states and fifty business groups brought suit challenging the rule in the U.S. District Court for the Eastern District of Texas, noting that the significant compliance costs would cause irreparable harm by forcing states and businesses to substantially increase their labor costs. Judge Mazzant enjoined enforcement of the rule, noting that rule “creates essentially a de facto salary-only test.” Judge Mazzant further concluded that the rule violates the Administrative Procedures Act by implementing an automatic wage update without the requisite notice and comment period. The Department of Labor can appeal the decision to the 5th Circuit, a court that previously blocked executive action on immigration.

Next Steps

What does all this mean for employers navigating complex labor and healthcare waters? Stay the course. Continue to comply with reporting requirements (including Forms 1094 and 1095). Repeal or partial repeal of the ACA may require a transition period and, even with significant change, may still be in effect while any change is implemented. The fate of the Department of Labor wage regulations is likewise unknown. Employers should keep future plans fluid, continue to monitor developments, and be prepared for changes.

In light of the FLSA ruling, employers should review proposed overtime policies and be prepared to consider halting implementation on some or all revisions to existing overtime policies and procedures while continuing to monitor developments as the case proceeds through the courts and the new administration takes office next year.

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