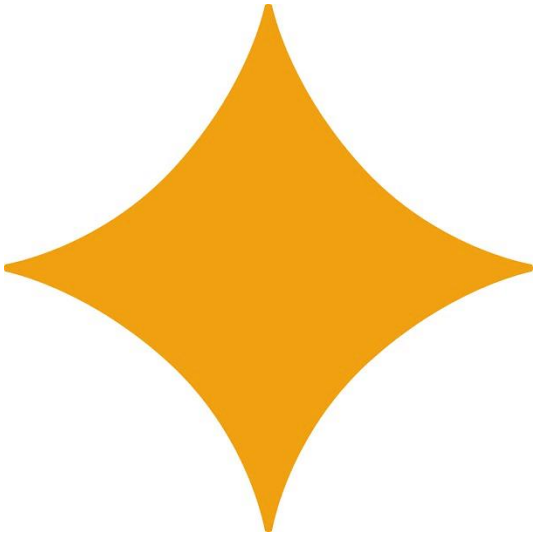
TRUCKER ✦ HUSS

A PROFESSIONAL CORPORATION
ERISA AND EMPLOYEE BENEFITS ATTORNEYS



The Future of ACA Under a Trump Presidency and GOP Controlled Congress

Mary Powell and

Eric Schillinger

January 11, 2017

The Future of the ACA

- Enacted in 2010, the Patient Protection and Affordable Care Act (ACA) made significant changes to the federal rules regarding health coverage, including employer-sponsored group health plans (GHPs)
  - This presentation largely focuses on the rules relating to GHPs
- President-elect Trump and the GOP have vowed to "repeal and replace" the ACA
- Even with GOP control of the Presidency and Congressional majorities, a complete repeal of the ACA is unlikely
  - Many ACA changes require a filibuster-proof majority vote in the Senate (60)
  - A small number of changes (albeit significant ones) do not require overcoming the filibuster—largely those related to taxes and spending (reconciliation)
- However, the Executive Branch can make at least some ACA changes unilaterally

Agenda

- Why & How Congress Passed the ACA
- Brief Overview of the ACA
- Some Reasons for the Clash of Thoughts
- Effects of the ACA So Far
- GOP Repeal and Replacement Proposals
  - Common concepts in the proposals
  - Specific provisions of certain proposals
- Legislative Obstacles to Complete Repeal and Replacements Plans (Filibuster)
- Modifying/Undermining the ACA Through the Executive Branch
  - Revising/withdrawing prior guidance issued by the agencies with ACA enforcement authority (IRS, DOL, HHS, etc.)
  - Non-enforcement of ACA provisions by those agencies
- House v. Burwell

Why & How Congress Passed the ACA

Reasons Congress (the Democrats) Passed ACA

- When President Obama took office, roughly 50.7 million people were uninsured
  - This was the largest number in history
- Most voters agreed that something needed to be done, but there was no consensus on what to do and who should do it (the federal government or the states)
- In general, the blueprint for the Democrats was that:
  - Everyone should have access to quality, affordable health care (*e.g.*, guaranteed issue and cost subsidies);
  - No one should ever go broke because they get sick (*e.g.*, no annual and lifetime limits on certain "essential" benefits); and
  - The federal government was the body to fix these problems

At First, It Seems Like Smooth Sailing

- In the 2008 election, the Democrats had a 257 to 199 seat advantage in the House
- In the Senate, the Democrats gained eight seats to hold 57 out of 100 seats.
  - At the time, there were two Independent Senators, and each was expected to vote for the law
- The Democrats needed one more seat in the Senate to gain a supermajority, which is 60 seats, and ensure that the Republicans would be unable to block the passage of healthcare reform with a filibuster
  - The 60th seat came when Senator Arlen Specter of Pennsylvania switched his party affiliation from Republican to Democrat on April 28, 2009

Some Bumps in the Road

- **August 25, 2009:** Massachusetts senator Ted Kennedy died and put the Senate Democrats' 60-seat supermajority at risk
- **September 24, 2009:** Democrat Paul Kirk was appointed interim senator from Massachusetts, which temporarily restored the Democrats' filibuster-proof 60th vote
- **November 7, 2009:** In the House of Representatives, 219 Democrats and one Republican vote for the Affordable Health Care for America Act
- **December 24, 2009:** In the Senate, 60 Democrats vote for the Senate's version of the bill
  - At this point, there didn't seem to be an urgent need for Democrats to reconcile both bills immediately, because the Massachusetts special election (scheduled for January 19, 2010) was almost certain to fall to the Democratic candidate
  - But that is not what happened

Some Bumps in the Road

- **January 2010:** Scott Brown, a Republican, wins the special election in Massachusetts to finish out the remaining term of US Senator Ted Kennedy
- **March 2010:** At this point, there are 2 separate bills and the Senate lacked the 60 votes it needed to pass a new, combined bill. So, a deal is made:
  - The House passes the Senate bill in a 219-212 vote. All Republicans and 34 Democrats vote against the plan. (Remember, this is the Senate bill that no Republicans voted for passing.)
  - It is sent to the President and he signs it on March 23, 2010.
  - On March 25, 2010, through the reconciliation process, the Senate passes the Reconciliation Act in a 56-43 vote and the House approves it.
- No Republicans voted for these bills

Some Bumps in the Road

- Why that history matters?
  - Understanding that the Republicans were never behind the ACA
  - It passed at the last minute, by the House approving the previously approved Senate bill, after the Senate no longer had 60 Democrats

Brief Overview of the ACA

Brief Overview of the ACA

- Largely based on the following core principles (three-legged stool):
  - Guaranteed issue and community rating (access);
  - Subsidies for low-income individuals (affordability); and
  - Individual mandate (ensure stable risk pools)
- With regard to GHPs, the ACA rules essentially fit into three categories
  - Taxes and fees;
  - Reporting requirements; and
  - Coverage mandates/requirements

Brief Overview of the ACA – Provisions Relating to GHPs

- Taxes and Fees
  - Employer Mandate
  - Cadillac Tax
  - PCORI fees
  - Transitional Reinsurance Program Fees
- Reporting
  - Employer reporting on GHP coverage and offers of coverage on Forms 1094 and 1095 (for IRS to administer subsidies and employer and individual mandates)
  - W-2 cost of coverage reporting
- Coverage-related Mandates
  - Prohibition of PEC exclusions
  - Prohibition of annual and lifetime dollar limits on essential health benefits (EHBs)
  - Dependent child coverage up to age 26

Brief Overview of the ACA – Provisions Relating to GHPs

- Coverage-related Mandates (cont'd)
  - Summary of benefits and coverage (SBC) requirements
  - Coverage of approved clinical trials
  - Prohibition of "excessive" plan waiting periods for eligibility
  - Required coverage of in-network preventive health services with no cost-sharing
  - Prohibition of "rescissions" of coverage
  - Limits on annual out-of-pocket expenses for in-network benefits
  - Appeals process and external review requirements
  - Restrictions on tax-free reimbursements of OTC medications by health FSAs, HSAs, HRAs and Archer MSAs
  - Nondiscrimination rules for insured GHPs (not yet implemented)
  - Annual cap on salary reduction contributions to health FSAs

Brief Overview of the ACA – Provisions Relating to GHPs

- The ACA and other rules for GHPs largely are contained in the following statutes (and related regulations/guidance):
  - ERISA
  - The Internal Revenue Code (Code)
  - The Public Health Service Act (PHSA)
- Primarily, the following government agencies have the authority to enforce those laws and issue related regulations and guidance:
  - DOL for ERISA provisions;
  - Department of Treasury (and IRS) for Code provisions; and
  - Department of Health and Human Services (HHS) for PHSA provisions

Other Provisions

- Outside of the GHPs rules, the ACA included many other key features, such as the following listed below:
  - **Minimum Standards:** Each policy must meet certain minimum coverage standards by covering EHBs
  - **Individual Mandate:** Unless a person qualified for an exemption, he or she must purchase health insurance or pay a non-compliance penalty
    - This was to get the healthier adults to purchase coverage to prevent adverse selection
  - **Health Insurance Exchanges:** If a person did not have insurance through his or her employer or the government (such as Medicare), the individual would purchase coverage on an Exchange
  - **Low Income Subsidies:** Individuals and families with an income less than 400% of the federal poverty level who purchase health insurance through an Exchange could be eligible for a subsidy from the government

Other Provisions

> Medicaid Expansion:

- Medicaid is a state-administered program created in 1960s to provide healthcare services to the poor. This program has been a major cost for state governments.
- To help, the federal government contributes a percentage of each state's Medicaid budget (on average, 55+%), as long as the state abides by strict federal guidelines.
- A person historically had to satisfy two tests to be eligible for Medicaid:
  - belonging to a “categorically” eligible group (generally children, pregnant women, parents, blind or disabled persons, and the elderly); and
  - meet the financial test set by the state for that group.
- Prior to the ACA, the federal government mandated that eligibility levels for children and pregnant women be at least 100-133%, but eligibility levels for parents could be much lower, and states were not required to cover adults without dependent children at all.

Other Provisions

- **Medicaid Expansion (cont'd):**
  - One of the major provisions of the ACA was to expand the eligible group and increase the Medicaid income threshold. It was meant to be a requirement for a state in order for it to receive federal funds for Medicaid
  - The U.S. Supreme Court ruled that a state may "opt out" of the expansion without jeopardizing its existing federal Medicaid funds
  - If a state did not opt out, a person in that state could qualify for Medicaid if he earned earn up to 133% of the federal poverty level
  - The ACA also provides a 5% "income disregard," which effectively increased the qualifying threshold to 138%

Other Provisions

- Why do the proposed changes to Medicaid impact employers?
  - If the Medicaid expansion is removed and the amount of the federal Medicaid dollars given to the state are significantly decreased, then many lower paid workers and part-time workers will lose coverage
  - Will employers fill that gap? Or feel a pressure to fill that gap?
- Why do the proposed changes to Medicare impact employers?
  - Some of the GOP proposals include privatizing Medicare coupled with a voucher system—move the post-65 retirees to the private market with a federal subsidy
  - If those plans become too expensive or provide limited benefits, will the employers go back to offering retiree medical? Will employees work longer/to an older age—and how will that affect employer-sponsored active plans?

Some Reasons for the Clash of Thoughts

Some Reasons for the Clash of Thoughts

- **Transfer of Wealth:** Through the Medicaid expansion and the subsidies to purchase health insurance coverage on the Exchange, wealthier people are subsidizing the cost of insurance coverage for poorer individuals
  - Democrats often agree with this strategy, while Republicans may view this as a redistribution of wealth forced by the government
- **Addressing Health Care Costs:** Need to reign in healthcare costs, especially Medicare and Medicaid
  - Democrats believe that the ACA will do that, eventually
  - Republicans think the ACA stymies cost-saving innovations
- **Free-Market versus Government Intervention:** Democrats think that the government should play a more paternal role, while many Republicans think that free-market system, with competition, is the best solution

Some Reasons for the Clash of Thoughts

- **Government Spending:** The ACA increases government spending.
  - It increases regulations on what insurance must provide and whom it must cover
    - The idea being to get more people covered with more generous benefits—with a lot of intervention by the federal government
  - Republicans want to spend less, lower taxes and reduce regulation—cap what the federal government spends on healthcare
  - The Republicans do not like that the federal government is determining how insurance is sold, the terms of insurance, the price, etc.
    - They want this to be a power of the state

Effects of the ACA So Far

- **Uninsured Rate:** The uninsured rate is at an all time low
  - About 20 million people gained insurance as a direct result of ACA
  - As of January 3, 2017, 8.8 million enrolled through the federal exchange (healthcare.gov)
  - The numbers reported for healthcare.gov did not include enrollment for the 11 states and Washington, D.C., that operate their own exchanges
- **Pre-existing Conditions:** People with pre-existing conditions can get coverage—and are getting coverage
  - HHS states that a large fraction of non-elderly Americans have pre-existing health conditions and tens of millions of Americans with pre-existing conditions experience spells of uninsurance
  - About 23% (31 million) experienced at least one month without insurance coverage in 2014, and nearly one-third (44 million) went uninsured for at least one month during the two-year period beginning in 2013
  - In 2014, the share of Americans with pre-existing conditions who went without health insurance fell by 22%, a drop of 3.6 million people

Effects of ACA So Far

- **Health Care Spending:** Total per capita health care spending increased over the last 8 years (due, in part, to the increased number of people with coverage)
  - However, the total growth in the cost of care per person enrolled in health insurance has slowed (but is not dramatic)
- **Incentives:** Started using a model that rewards providers for health improvement, rather than paying set fees for individual services (this is very new—not a lot of data)
- **Transparency:** Costs are more transparent
  - However, it is not clear how that information is being used currently
- **Compliance Costs:** ACA imposes significant compliance costs on insurers and employers

Effects of ACA So Far

- **Adverse Selection:** The amount people are paying in premiums for individual insurance plans is increasing
  - Many people who have not had insurance, and may have pre-existing conditions, have enrolled
    - Young people are not signing-up for insurance
  - As a result, insurance carriers are losing money, and raise premiums in response
    - The risk corridors guard against some of the adverse selection risk, but they are temporary
  - Theoretically, as premiums increase, the cost of coverage becomes no longer desirable to the least sick group of enrollees

GOP Repeal and Replacement Proposals

GOP Repeal and Replacement Proposals – Overview

- In general, GOP party leaders, including the President-elect, have advocated an outright repeal of the ACA
- The President-elect has not provided significant detail about a replacement proposal
- Other prominent GOP figures have provided more comprehensive replacement proposals:
  - House Speaker Paul Ryan ("A Better Way")
  - Rep. Tom Price—Trump's Proposed HHS Secretary ("Empowering Patients First Act")

Common Themes with the GOP Proposals

- **Coverage Sources:** Four main ways to obtain coverage:
  - Employer (GHPs);
  - Medicaid;
  - Medicare; and
  - Open insurance market
- **Medicaid Spending:** Decrease Medicaid expenditures from the federal government
- **Privatization of Medicare**: Move to a private exchange system with vouchers
- **Rein in GHP Tax Benefits:** Cap the amounts that employers can deduct for healthcare costs for employees and that employees can exclude from income

Common Themes with the GOP Proposals

- **Fewer Mandates:** For example, allow lifetime and annual limits
- **Fewer Taxes:** Repeal many of the taxes
- **Less Government Involvement:** Move healthcare to the open market and away from the control of the federal government

Trump Proposal

- **Outright Repeal:** Generally, repeal the ACA in its entirety
  - Many times stated the need to eliminate the individual mandate
  - Has hinted at retaining ACA prohibition of pre-existing condition exclusions
- **HSAs:** Expand HSA access
- **Remove the "Lines Around the States":** Allow sale of health insurance across state lines

Trump Proposal

- **Cost Transparency:** Require transparency from all healthcare providers
- **Medicaid:** Block grant Medicaid to the states
  - Give states a fixed sum of money and give the states more flexibility on how to spend it
- **Market Efficiencies:** Remove barriers to entry into free markets for drug providers that offer safe, reliable and cheaper products (*e.g.*, allow consumers to access imported drugs)

Paul Ryan Proposal

- Comprehensive repeal and replacement proposal by Paul Ryan ("A Better Way")
- Includes repeal of most ACA provisions relating to GHPs and sponsoring employers:
  - Exchange subsides;
  - Employer Mandate and Cadillac Taxes; and
  - (Presumably) most of the ACA mandates (*e.g.*, preventive care)
- Appears to retain at least some ACA Provisions (*e.g.*, coverage of dependent children up to age 26)
- Also includes significant changes to the individual market and government provision of health coverage

Paul Ryan Proposal

- **Cap on GHP Tax Exclusion:** Cap on tax exclusion for contributions to, and benefits under, GHPs
  - This is a revenue raiser that is similar to the Cadillac tax
- **HSA Availability:** Expand HSA availability, including changing the contribution limit to the maximum combined and allowed annual deductible and out-of-pocket limits
- **HRA Availability:** Permit standalone HRAs and employer payment plans for active employees (*i.e.*, eliminate integration requirement)
- **Wellness Programs:** Removing certain limits and restrictions on wellness program incentives
  - Likely remove the EEOC rules and use the current HIPAA rules

Paul Ryan Proposal

- **State Insurance Markets:** Permit insurance to be sold across state lines
- **Tax Credits for Individual Insurance:** For those without access to employer-sponsored health coverage, give them a refundable tax credit ("portable payment") to buy insurance
  - This could be used to purchase a wide variety of health insurance products (like mini-med plans or plans without inpatient hospital coverage—no guarantee that the insurance product being sold is like those under the ACA, which required coverage of essential health benefits)
  - If portable payment is less than the cost of health insurance coverage chosen, the difference is deposited in an HSA-like vehicle
  - Portable payment based on age or family size and not the person's income

Paul Ryan Proposal

- **Small Employer Group Arrangements:** Expand ability to allow small employers to band together to purchase insurance and remove the legal barriers that thwart that today
  - This is interesting. There are specific MEWA rules and underwriting rules that do not permit this approach. Will need to be a change to both the federal rules and the state rules
- **Pre-existing Conditions:** Go back to old HIPAA rules about pre-existing conditions exclusions for GHPs and apply similar rules to the individual market
  - Not exactly the same. One-time period to join, even if sick. If don't enroll at that time, allow pre-existing condition limitations
  - Would need to re-establish and bolster state high-risk pools for those who are sick and do not join during this one-time period (which will likely occur given that people may not be financially able to purchase coverage during that one-time window)

Paul Ryan Proposal

- **Medicaid:** Cap Medicaid funding from the federal government
  - Per capita allotment—payments are based on enrollment of certain individuals
    - Amounts would be determined by the state's average medical assistance and non-benefit expenditures for the year in 2016, adjusted for inflation but at a lower rate than the actual growth rate
  - Block Grant—if opt-out of the above, receive a fixed block grant. This amount is capped but states have more flexibility on how to use the federal funds
- **Malpractice Reform:** Change medical malpractice law by limiting the amount that plaintiffs could recover
- **High-risk Pools:** Government funds, to some level, state high-risk insurance pools

Rep. Price Proposal

- "Empowering Patients First Act"
  - As with Trump and Ryan proposals, advocates complete ACA repeal
- **Pre-existing Conditions:** Allow pre-existing condition exclusions, subject to "continuous coverage" exception
  - If do not have continuous coverage for at least 18 months, insurers can impose pre-existing condition exclusions for 18 months and raise premiums by 50% for up to 3 years
  - Intended to help contain costs in the insurance markets
- **GHP Tax Exclusion:** Cap tax exclusion for employer-provided health coverage at $20,000 for family coverage and $8,000 for individual coverage
- **Defined Contribution Arrangements:** Permit employers to use "defined contribution" health care accounts for purchase of non-GHP coverage (similar to standalone HRA concept)

Rep. Price Proposal

- **HSAs:** Expand HSA access (*e.g.*, increase the contribution limit to match the IRA limit and permit rollovers from health FSAs and HRAs to HSA accounts)
- **Wellness Incentives:** Increase permitted wellness incentive limits under HIPAA from 20% to 50% of cost of coverage
- **Tax Credits:** Individuals who purchase coverage on the free market are granted refundable tax credits, depending on their age
  - Not eligible for tax credits if receiving insurance from employer, Medicare, Medicaid, TRICARE
- **Treatment Guidelines:** HHS creates clinical guidelines for treatment of medical conditions. If followed, it would be a safe harbor defense against medical malpractice claims
- **Eliminate Medicaid Expansion:** The expanded Medicaid coverage under ACA would be eliminated
- **State Insurance Markets:** Allow insurance to be sold across state lines

Legislative Obstacles to Complete Repeal and Replacements Plans

Legislative Obstacles to Complete Repeal and Replacements Plans

- Changes to the ACA statutes must be made through the legislative process
  - Passed by the House and Senate
  - Signed into law by the President
- In the Senate, most bills require a filibuster-proof majority (60 votes)
  - GOP controls 52 Senate seats
- Using the "reconciliation" process, certain legislation relating to spending, revenues, and expenses can be passed in the Senate with a simple 51-vote majority
  - Likely not available for the various ACA coverage mandates (*e.g.*, prohibition against pre-existing condition exclusions)
  - Congress passed such a partial-repeal bill in 2015 (vetoed by President Obama)
- Given these limitations, a complete repeal of the ACA is unlikely

Reconciliation

- Requires a simple 51-vote majority in the Senate
- Includes certain procedural requirements, such as:
  - The process begins with Congress' adoption of budget legislation authorizing the use of reconciliation plus providing instruction to House and Senate committees regarding reconciliation
  - In the Senate, reconciliation bills are subject to "point of order" challenges to strike legislation outside the scope of reconciliation. If upheld, these challenges can be waived only with a 60-vote majority.
- Legislation outside the scope of reconciliation is referred to as "extraneous" and is prohibited by the "Byrd Rule"
  - These requirements are discussed on the next slide

Reconciliation

- Generally, a provisions is considered “extraneous” if (with some exceptions):
  - It does not produce a change in outlays or revenues;
  - It produces an outlay increase or revenue decrease when the instructed committee is not in compliance with its instructions;
  - It is outside of the jurisdiction of the committee that submitted the title or provision for inclusion in the reconciliation measure;
  - It produces a change in outlays or revenues which is merely incidental to the nonbudgetary components of the provision;
  - It would increase the deficit for a fiscal year beyond the “budget window” covered by the reconciliation measure; or
  - It recommends changes in Social Security
- Although the Senate Parliamentarian advises on this process, ultimately the Presiding Officer (the VP, if in attendance) makes this determination

Reconciliation – 2015 GOP Partial Repeal Attempt

- Restoring Americans' Healthcare Freedom Reconciliation Act of 2015
- Passed through reconciliation, but vetoed by President Obama in early 2016
- Sought to repeal core ACA taxes as well as certain other provisions relating to GHPs and plan sponsors
  - Employer mandate
  - Cadillac Tax
  - Annual cap on health FSA salary reductions
  - Prohibition on tax-free reimbursements of OTC medications by health FSAs, HRAs, HSAs and Archer MSAs
- Did not seek to repeal coverage-related mandates (*e.g.*, PEC exclusions, preventive care, etc., annual and lifetime limits on EHBs, etc.)
  - Likely would have been considered extraneous

Reconciliation—2017

- On January 4, 2017, through a 51-48 vote, a procedural motion was passed to start debate on a budget resolution
  - This is one of the first steps in the reconciliation process
- All Republican Senators voted for it, except Rand Paul
  - Senator Paul called the budget proposal one “that never balances,” but rather “...a budget that will add $9.7 trillion dollars of new debt in ten years”
- A few other Republican Senators, who voted in favor of the budget resolution, voiced concerns about the budget and the lack of a replacement proposal

Modifying / Undermining the ACA Through the Executive Branch

Telephone: 415-788-3111 | Facsimile: 415-421-2017 | www.truckerhuss.com

Modifying / Undermining the ACA Through the Executive Branch

- By appointing the Secretaries of Treasury, Labor and HHS, the Trump Administration can make some ACA changes unilaterally (and delay ACA provisions not yet effective)
  - Subject to confirmation of Trump's appointees by the Senate
- Although any such regulations and guidance must be consistent with the underlying statutes, those statutes leave the agencies with considerable room to interpret and issue rules
  - As a result, there are some instances where an agency can make substantial changes to ACA rules without going through Congress
- Certain procedural requirements apply when revising previously issued regulations (explained on next slide)

Passing New Regulations

- Generally, the following process is required to pass new regulations:
  - Issue a notice of proposed rulemaking;
  - Receive public comments on the proposed rule;
  - Issue a final rule; and
  - Set an effective date for the rule that is at least 30 days after publication of the final rule in the *Federal Register*
- Courts have enjoined the enforcement of regulations where the procedural requirements were not met

Changing Regulations

- Possible Approaches by President-elect Trump
  - Suspend the effective date of regulations that were issued but have not yet gone into effect
    - Limited application to ACA
  - For regulations recently issued (after May 16, 2016), ask Congress to use the Congressional Review Act
    - This law allows Congress to bypass filibusters in the State
    - Limited application to ACA

Changing Regulations

- Possible Approaches by President-elect Trump (cont'd)
  - Could ask Congress to pass a law overturning regulations, but this requires a filibuster-proof majority in the Senate
  - Use the courts to overturn certain regulations
    - Takes years and often unsuccessful
  - Issue new regulations

Modifying/Undermining the ACA Through the Executive Branch – Examples of Potential ACA Changes

- HHS
  - Eliminate the requirement for plans (including GHPs) to cover emergency contraceptives (*e.g.*, Plan B) as "preventive care"
  - Revise the meaning of items listed as essential health benefits
  - Reverse that discrimination based on transgender status is discrimination based on sex
- IRS/Treasury
  - Delay or not issue regulations implementing the nondiscrimination rules for insured GHPs
  - Prioritize enforcement and place individual mandate penalty at the bottom
- Other Agencies
  - Withdraw EEOC's ADA and GINA wellness regs for GHPs, effectively eliminating the EEOC's role in regulating employer wellness programs

Potential Problems

- A repeal now, without a replacement option, is high risk for the GOP
- GOP leaders are promising a "transition" period as part of a "repeal and delay" plan. But there is no consensus on how long Republicans want to delay the repeal from going into effect—and the reaction of a delay by the insurance carriers
  - Not knowing what is next may cause the insurance carriers to leave the Exchanges due to the uncertainty
- If the GOP takes away the government subsidies and the individual mandate (but is forced to leave other provisions of ACA, such as the ban on pre-existing condition exclusions), the insurance market could destabilize
  - Again, the insurance carriers would likely leave the Exchanges
  - Very risky approach for the GOP, as a way to get the Democrats to play the game with them

Potential Problems

- Everyone is aware of the high risks associated with the repeal and a delayed replacement plan
- The news reports that President Obama has encouraged Democrats to not bail the Republicans out if they repeal ACA
- President-elect Trump Tweeted, “Republicans must be careful that the Dems own the failed ObamaCare disaster…”

Potential Problems

- Removal of the Medicaid expansion could cause around 10 million people to lose coverage
- House Republicans want to tackle Medicare, but the Senate Republicans want to focus more directly on the ACA
  - > Touching Medicare will cause AARP to jump into action!
  - > President-Elect Trump tweeted less than a year ago that there would be no cuts to Medicare & Medicaid
    - He now states that he wants to modernize Medicare, without any specifics

House v. Burwell

House v. Burwell

- The ACA includes the refundable tax credit providing premium assistance for the purchase of coverage
  - Appropriation for this is clearly in the statute
- The ACA also contains a provision for reduced cost-sharing for individuals enrolling in Exchange plans
  - Essentially, if a person is eligible for the tax credit, insurers offering coverage on the Exchange must reduce deductibles, coinsurance, payments and similar charges—these are the cost-sharing reductions (CSR)

House v. Burwell

- For these CSR, the insurers are supposed to get their money back
- To qualify for the CSR, an individual must enroll in an Exchange plan and have household income that exceeds 100% but does not exceed 400% of the poverty line for a family of the size involved
- Individuals with income between 100% and 250% of the poverty line qualify for an additional reduction
- Eligibility for the premium tax credit is a prerequisite to receiving the CSR
- Appropriation for the CSR is not directly stated, but rather inferred in the Act

House v. Burwell

- The lower court ruled in favor of the House and stated that the U.S. Treasury and the HHS violated the US Constitution by reimbursing the insurance carriers for the CSR costs when the spending of that money was not validly appropriated by Congress
  - The court stated that the appropriation must be clear and direct to be valid—it could not be inferred
- Any further reimbursements were enjoined until valid appropriation was in place, although the injunction was stayed pending appeal
  - Essentially, while the court ruled against the use of taxpayer money to pay for CSRs, it would allow it during the time period that the case was being appealed

House v Burwell

- With the election of Donald Trump, the House asked for a stay of the litigation, suggesting to the court that it might be able to settle the case with the Trump administration. The court stayed the appeal until late February
- On December 20, 2016, two CSR private citizens asked the appellate court to let them intervene, claiming their interests were not being represented with the end of the President Obama administration
- On December 29, 2016, the court lifted the stay for the purposes of hearing the motion to intervene
- The court should have time to decide the motion before the change of administration

House v Burwell

- Why this case matters to employers?
  - If the court rules that there is no appropriation for the CSRs, the Exchanges will collapse—if the ACA requires that the insurance carriers include the cost sharing reductions but there is no federal money to reimburse the insurance carriers, then the insurance carriers will leave the Exchanges
  - If there are no Exchanges, more individuals will look to their employers for coverage
  - If there are no Exchanges, the pre-65 retirees will look to their former employers for coverage
  - If the Exchanges collapse, the Democrats will have to work with the Republicans on a replacement plan for the ACA

In Summary—Back to Employer Plans

Summary

- The House will pass the reconciliation bill, which will repeal many parts of the ACA
  - It is likely that it will also pass the Senate
  - Because of the reconciliation requirements, the repeal bill will be limited in scope
  - The coverage mandates will remain intact
- The repeal likely will have a delay of several years, until there can be an agreement on the replacement plan
- Employer-sponsored plans will still have a key role
- There may be some cap on the amount that employers can deduct for health care payments
  - Maybe employer-sponsored plans will provide less coverage and individuals will be sent to the open markets for wrap around plans?
- The Republicans likely will not privatize Medicare—too controversial
- The Medicaid expansion will likely be repealed and federal Medicaid payments will be reduced/capped

Contact

Trucker ✦ Huss, APC
One Embarcadero Center, 12th Floor
San Francisco, CA 94111
(415) 788-3111

mpowell@truckerhuss.com

eschillinger@truckerhuss.com

www.truckerhuss.com

Disclaimer

- These materials have been prepared by Trucker ✦ Huss, APC for informational purposes only and constitute neither legal nor tax advice
- Transmission of the information is not intended to create, and receipt does not constitute, an attorney-client relationship
- Anyone viewing this presentation should not act upon this information without seeking professional counsel
- In response to new IRS rules of practice, we hereby inform you that any federal tax advice contained in this writing, unless specifically stated otherwise, is not intended or written to be used, and cannot be used, for the purpose of (1) avoiding tax-related penalties or (2) promoting, marketing or recommending to another party any tax-related transaction(s) or matter(s) addressed herein