



HEALTH REFORM ADVISORY PRACTICE

Weekly Legislative Update



Dec. 9, 2016

In 2009, as the Affordable Care Act (ACA) began to wind its way through Congress, Lockton's Health Reform Advisory Practice (HRAP) began a long-running weekly legislative update series to keep you apprised of significant legislative developments as they unfolded on Capitol Hill. With the winds of health reform change again blowing in Washington, we are reinitiating those weekly updates.

21st Century Cures Act Clears Congress, Heads to the President's Desk

The Senate this week overwhelmingly passed the final version of the 21st Century Cures Act and sent the bill to the President, who is expected to sign it on Tuesday. The Act is a more than \$6 billion medical research funding bill, and includes several items of interest to employer group health plan sponsors, as we outlined in last week's [Legislative Update](#).

We are preparing a Compliance Services *Alert* on the Act for distribution early next week. As we noted in last week's *Update*, the most interesting aspect of the bill (from an employer's perspective) is the accommodation granted small employers – those not subject to the Affordable Care Act's employer mandate – to provide tax-free reimbursement of at least a portion of the cost of coverage obtained elsewhere, such as in the individual market. ACA rules had put the kibosh on employers' ability to do that.

House Bill Would Allow TRICARE Enrollees to Opt Out, Qualify for HSA Contributions

The Veterans TRICARE Choice Act has cleared the House of Representatives by a wide margin and is awaiting action in the Senate, where we understand it is expected to receive similar treatment. The Act allows TRICARE-enrolled individuals the option to at least temporarily pause their TRICARE coverage in order to qualify to make tax-free contributions to health savings accounts (HSAs), or to have contributions made for them by an employer.

The Tax Code's HSA rules do not allow individuals to make HSA contributions (or have contributions made for them) unless they are enrolled under a high deductible health plan (HDHP) and *not* enrolled in non-high deductible medical coverage. Coverage under TRICARE, like coverage under Medicare, is disqualifying coverage.

The Veterans TRICARE Choice Act would allow individuals enrolled in TRICARE to opt out of the program in order to qualify to make HSA contributions. They could then re-enroll in TRICARE later, during a designated special enrollment period.

Lockton comment: TRICARE is the Department of Defense-administered health benefits program covering active and retired uniformed services personnel and their dependents ([here](#) is a summary of the eligibility rules). It's possible that some individuals who have TRICARE coverage, e.g., working spouses or dependents of active duty military personnel (including reservists called to active duty), might have access to coverage under an employer's HDHP and desire to make HSA contributions. The Act would provide a means for them to exit TRICARE coverage at least temporarily.

This would be the second somewhat quirky rule, in the HSA context, related to service members. An existing rule treats veterans who are entitled to Veterans Administration (VA) benefits as ineligible to make HSA contributions for a month if they received certain VA care within the three months prior to the month in question.

ACA Repeal Bus Inching Forward, Direction Not Entirely Certain

There's still no consensus among Congressional Republicans on how to make good on their long-promised repeal of the ACA.

Action on Capitol Hill this week – including an outreach to state governors and insurance commissioners – *did* reveal that GOP leadership is certainly aware of the dangers in proceeding in precipitous fashion.

Leadership asked state leaders and others for input on how to unwind the ACA's individual mandate without harming the individual health insurance market, which has been battered in many areas by sharply rising insurance costs. Those increases are due in part to ACA-imposed requirements compelling insurers to issue policies to any applicant regardless of health condition, and prohibiting insurers from applying pre-existing condition restrictions. But eliminating the individual mandate without freeing insurers from those requirements would compound, not mitigate, the individual market's problems.

By late this week consensus around whether to repeal and replace, or repeal *and delay* seemed to be coalescing around the repeal and delay approach. "Repeal and delay" means an immediate repeal of the ACA, but allow aspects of the law to sunset a year or two in the future, to give the GOP time to work out a replacement plan.

All signs now point to the passage of a budget resolution in the first week of January, a requisite for a maneuver in the Senate that would allow a repeal bill to clear that chamber with just 51 votes. Congressional Republicans were talking about having a repeal bill on President-elect Donald Trump's desk the day after his inauguration, or shortly thereafter.

Assuming repeal and delay, it is not clear precisely what portions of the repeal law would be effective immediately, and what portions would be delayed. For example, it's possible a repeal

of the employer mandate could take effect immediately (and maybe even retroactively), while the effective date of a repeal of the rules regarding health insurance exchanges and subsidies for the purchase of individual coverage would be delayed.

The repeal and delay strategy sets up a game of high stakes poker in the Senate. Republicans are hoping that a delayed effective date will force Democrats to parley over the next year or two, for fear of being seen as responsible for not helping pass a comprehensive replacement plan before the delayed repeal takes effect. But Democrats are adopting a “You break it, you own it” approach, and warning Republicans not to expect their acquiescence in any unwinding of the ACA.

Lockton comment: Republicans would like cooperation from the Democrats because, without it, Republicans are hamstrung a bit in what they can repeal and replace. Generally speaking, Republicans can push through the Senate, on a mere 51 votes, matters pertaining to the federal budget. Some of what’s in the ACA, and some of what the GOP would like to replace those items with, might not have an adequate relationship to the budget to ride through on just 51 votes. There seems to be little question, however, that repeal of the employer and individual mandates could be passed with that simple majority vote.

Amid the uncertainty moving forward, seven states that have not expanded Medicaid eligibility (as called for under the ACA) but were planning on doing so – or were taking steps in that direction – for 2017 have halted those plans, according to published sources. The states are Georgia, Idaho, Kansas, Nebraska, South Dakota, Tennessee and Wyoming.

Edward Fensholt, JD
Rory Akers, JD
Lockton Compliance Services

Lockton Benefit Group | 444 West 47th Street | Suite 900 | Kansas City | MO | 64112

Not Legal Advice: Nothing in this Alert should be construed as legal advice. Lockton may not be considered your legal counsel and communications with Lockton's Compliance Services group are not privileged under the attorney-client privilege.

© 2016 Lockton Companies