



HEALTH REFORM ADVISORY PRACTICE

Weekly Legislative Update



June 2, 2017

Little Action This Week on Health Reform, But Changes Afoot for the Contraceptive Mandate

Congressional recess this week meant little action on the Senate's effort on health reform. Some published reports suggested Senate staffers will have a draft proposal next week, but it is unlikely anything will become public. Instead, the proposal is likely to be quietly circulated among key senators to gauge support.

If the proposal gains adequate support, the Senate bill will need a new score from the Congressional Budget Office (CBO). Unlike the recent [score](#) on the House-passed American Health Care Act (AHCA) that was made public last week, Senate Republicans will likely ask the CBO to confidentially assess various proposals as work on fine-tuning the legislation continues.

Additionally, the Senate Parliamentarian, whose job it is to say whether legislation meets the Senate's procedural rules, will have to review the bill to ensure it can advance using the filibuster-proof reconciliation process. Keeping discussions with the Parliamentarian confidential will likely be more difficult, because Senate Democrats will be involved in the process.

Lockton comment: Among other things, the reconciliation rules require the Senate's health reform legislation to reduce the deficit by at least the same amount as the House-passed American Health Care (AHCA), which is \$119 billion over 10 years. This might be difficult, as gaining votes from moderate Republican senators will likely require increased spending on Medicaid, and on tax credits to purchase individual coverage.

In that case, the Senate bill will need to include additional budget cuts or tax increases. The need for revenue, of course, makes us wary that Senate Republicans might consider taxing workers and employers on the value of their employer provided healthcare, as indicated in a Wall-Street Journal [article](#) yesterday.

The Affordable Care Act's Contraceptive Mandate

President Donald Trump signed an Executive Order last month encouraging federal regulators to consider issuing additional guidance to address conscience-based objections to the Affordable Care Act's (ACA) preventive care mandate requiring all non-grandfathered health

plans to provide contraceptives without cost-sharing (see our [Alert](#)). This week [Vox](#) obtained a draft of a regulation implementing the President's directive.

Current regulations say houses of worship are exempt from the mandate, and also provide an accommodation process for religiously affiliated employers (e.g., church-related hospitals and schools) and closely-held employers with religious objections. The draft regulation would provide an exemption for all employers with moral or religious objections to providing some or all of the mandated contraceptives.

Under the current accommodation process established by the Obama administration, the objecting employer can avoid providing cost-free contraceptives to female employees and dependents, but the plan's third party administrator (TPA) or insurer must then provide the benefit and is reimbursed by the federal government. In short, the Obama administration's approach was to allow the objecting religious-based or privately-held employer to avoid providing the contraceptives, while nevertheless ensuring that the employer's female employees and dependents would still have access to that benefit, via the TPA or insurer.

The draft regulation eliminates this requirement on TPAs and insurers, unless the employer voluntarily directs them to separately provide the contraceptive benefit. In other words, the draft regulation, if finalized without change, would permit *any* employer with moral or religious objections to contraceptives to ensure – by declining to direct the insurer or TPA to provide the benefit - that no female employee or dependent could obtain cost-free contraceptives by virtue of their coverage under the employer plan.

Lockton comment: Objecting employers need to tread carefully here. The leaked draft regulation addresses the ACA's requirement that *cost-free* contraceptives be available to female employees and dependents by virtue of their coverage under the employer plan (whether the benefit is provided by the plan, or its TPA or insurer). An effort by an objecting employer to eliminate contraceptive benefits in their entirety, with or without cost-sharing, can pose Title VII gender-based discrimination issues. The draft regulations, if finalized, are also certain to draw legal challenges from opponents.

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