



## HEALTH REFORM ADVISORY PRACTICE

### Weekly Legislative Update



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**August 4, 2017**

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## **Congress Adjourns and Leaves Repeal and Replace Unfinished, Further Major Efforts Unlikely**

The Senate has adjourned for the remainder of the month without a clear sense as to what, if anything, comes next for health reform. GOP leadership in the Senate has stressed the need to move on, and in the words of Sen. Roy Blunt (R-MO), “get some wins on the board.” President Donald Trump has called on Congressional Republicans to stick with repeal and replace of the Affordable Care Act (ACA), but rank-and-file members of both the House and Senate are now speaking about bipartisan solutions.

### **Momentum for Bipartisan Market Stabilization**

With the Senate Republicans’ unilateral effort to repeal and replace the ACA reaching a dead end last week, some lawmakers in both the House and Senate have spoken of the need for bipartisan efforts on health reform. In the Senate, Sen. Lamar Alexander (R-TN), chairman of the Senate Committee on Health, Education, Labor and Pensions, and Sen. Patty Murray (D-WA), the highest ranking Democrat on the Committee, have agreed to hold hearings in early September on ways to stabilize the individual health insurance market.

In the House, the Problem Solvers Caucus, a bipartisan group of moderate House members, presented a blueprint for market stabilization it thinks can gain support in both parties.

Sure to pique the attention of employers, the proposal seeks to modify the ACA’s employer mandate by exempting employers with fewer than 500 full-time and full-time equivalent employees (FTEs and FTEqs, the latter meaning fictional full-time employees made up of part-time hours) in the prior calendar year. The current threshold for the employer mandate is 50 FTEs and FTEqs. The group also proposes to change the definition of “full-time” under the employer mandate to 40 hours per week from the current 30 hours per week.

**Lockton comment:** The Problem Solvers' proposal provides key insights into how some lawmakers think a bipartisan solution might work. However, it is unclear how much traction this particular House proposal will receive. Speaker of the House Rep. Paul Ryan (R-WI) has said not to expect the House to hold another healthcare vote until the Senate proves it can pass something. So, while the Problem Solvers' blueprint may provide senators with ideas to consider, we expect the Senate to craft its own ideas on how to get the 60 votes necessary to pass its own bipartisan legislation.

Talks of a partisan, GOP-only repeal and replace effort continue but appear increasingly unlikely, not just for political reasons, but due to the simple exhaustion of time.

The recently derailed GOP repeal and replace effort occurred pursuant to resolutions, passed by both the House and Senate, that allowed the Senate to pass a bill with a filibuster-proof simple majority vote. Although not entirely clear, it appears the authority granted by those resolutions might expire on Sept. 30, the end of the government's fiscal year.

Congress can pass new resolutions authorizing a similar filibuster-proof process, but it seems clear the GOP wants to reserve such a new set of resolutions for its unilateral tax code overhaul, not health reform (it can't use a single set of resolutions for both).

Thus, more and more it appears that comprehensive, unilateral repeal and replace efforts have run entirely out of gas, and any health insurance-related federal legislation, at least in the near term, will have to proceed on a bipartisan basis.

**Lockton comment:** Even if Republicans want to revisit unilateral repeal and replace next month, it's difficult to imagine how they fit the effort into the legislative calendar. September is already shaping up to be a busy month with significant deadlines looming to fund the government, increase the debt limit and extend funding for certain Medicare payments and the popular Children's Health Insurance Program (CHIP).

## **CSR Battle Heats Ups**

The ACA authorized, but didn't fund, federal payments to insurers selling policies in the ACA's health insurance marketplaces (like HealthCare.gov), to shrink deductibles and other cost sharing requirements under policies sold to lower-income purchasers. These cost sharing reduction (CSR) payments were made by the Obama Administration from other funds available to the Administration, but Congressional Republicans sued to stop the payments, asserting that Congress hadn't appropriated money for them.

That lawsuit continues to linger. More importantly, the health insurers remaining in the ACA marketplaces want immediate assurances the CSR payments will continue to be made. They need an answer quickly – before late September – or they will have to impose larger premium increases for 2018 to account for the potential lack of CSRs. Some may even reconsider whether to participate in the marketplaces at all in 2018.

The Trump Administration, after the Senate's repeal and replace effort collapsed last week, suggested it might not authorize the CSR payments. This week, a federal court allowed Democrat governors in several states to join the pending lawsuit. They'll press the position that the CSRs must be made or their states' individual health insurance markets will suffer potentially catastrophic consequences.

### **Meanwhile Massachusetts Goes Back to the Employer Well to Shore Up its Medicaid Program**

Massachusetts governor Charlie Baker has indicated he will sign a bill that will increase taxes on employers as a way to help fund the Commonwealth's combined Medicaid and CHIP program, known as MassHealth.

Effective January 1, 2018, employer medical assistance contributions (EMAC) that are included in unemployment insurance payments will increase from a maximum of \$51 per employee to \$77 per employee. In addition, a new \$750 employer assessment will apply for each non-disabled employee who declines employer-sponsored health insurance and instead enrolls in MassHealth, or buys coverage on Massachusetts' health insurance marketplace (known as the Health Connector).

The new taxes would not apply to employers with fewer than six employees and thus exempt from EMAC. State agencies are tasked with issuing regulations on the requirements before the start of 2018.

***Lockton comment:*** While the new law is not entirely clear, it seems obvious that the new tax does not apply to an employer with fewer than six employees in Massachusetts. Employers with five or fewer employees in the Commonwealth, no matter how large the employer is elsewhere, appear to be exempt.

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