



HEALTH REFORM ADVISORY PRACTICE

Alert



Jan. 23, 2017

White House to Federal Agencies: Throttle Down on the Affordable Care Act (Also: Federal Judge Blocks Aetna–Humana Merger)

Well, *that* didn't take long.

In an executive order dated Jan. 20, the day of his inauguration, President Donald Trump directed federal agencies with responsibilities related to the Affordable Care Act (ACA) to take all actions to “the extent permitted by law” to mitigate the economic and regulatory burdens of the ACA. The text of the order is available [here](#).

In other news affecting the health insurance markets, a federal judge this morning cited antitrust concerns in blocking the pending merger of health insurers Aetna and Humana.

The Executive Order

While the tone of the order the White House issued Friday suggests the ACA's dismantling has now commenced in an earnest and concrete way, a careful reading of the order leaves one asking, “Wait...what?” As in, *what* precisely does the order allow, and what can it accomplish?

That answer, unfortunately, is not clear. The order is not law, of course. It neither makes new law nor repeals current law. By its terms it simply directs the relevant agencies (the IRS, Department of Labor [DOL], and the Department of Health and Human Services [HHS]) to do what they can to loosen the burden of the ACA. The order directs the agencies to:

“[E]xercise all authority and discretion available to...waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the [ACA] that would impose a ... cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products, or medications.”

But if the order directs this action only “to the extent permitted by law,” and the ACA is currently the law of the land, what precisely are the agencies supposed to do? The answer to that question won’t become clearer until the agencies begin to issue guidance implementing their interpretations of the order. But the order sets no timetable for such guidance.

The agencies could rescind regulations or issue new regulations in response to the order, but those actions can take considerable time (they’re dictated by specific processes). A better bet is that the agencies will simply decide not to enforce certain aspects of the ACA.

Let’s consider what that *might* mean for the three general categories of ACA provisions of most interest to group health plan sponsors: the employer mandate and its reporting obligations, the ACA’s various taxes and fees employers have been paying directly or indirectly, and the ACA’s health plan benefit mandates, including the ban on preexisting conditions, dollar limits on key benefits, and waiting period restrictions.

The Executive Order Versus the Employer Mandate and Reporting

The order doesn’t eliminate the employer mandate or its reporting obligation. In fact, the order doesn’t expressly refer to employers at all.

Lockton comment: We suppose employers that buy group insurance would be “purchasers of health insurance,” as that term is used in the order’s excerpt above. Employers that self-insure their health plans *might* be “health insurers,” at least as to their employees and the employees’ dependents, for purposes of the order.

If the IRS concludes the order directs it to soften the burden on employers in their capacity as health insurers or insurance purchasers, it might “waive, defer [or] grant exemptions from” the employer mandate penalty and the reporting obligation, because the mandate and its reporting obligation impose a “tax, penalty, or regulatory” burden on employers. But whether, when and how the IRS does so is anyone’s guess.

The Executive Order Versus the ACA’s Taxes and Fees

The ACA imposed a number of taxes and fees that employers have been paying directly, or indirectly through premium surcharges assessed by health insurers that were paying the taxes and fees. These include:

- The Transitional Reinsurance Fee, paid by health insurers and sponsors of self-insured plans. This fee is set to expire for 2017, but insurers and self-funded plan sponsors owe \$27 per covered life for 2016. That fee may be paid in two installments, with \$21.60 per enrollee due last week (Jan. 17) and a second installment of \$5.40 per enrollee due in November 2017. The second, smaller installment may now be on the chopping block.
- The Patient-Centered Outcomes Research Institute Fee (PCORI), paid by health insurers and sponsors of self-insured plans. These fees, roughly \$2 per enrollee, are due by July 31. We suspect collection of this fee will now be suspended.
- An excise tax on health insurers. This tax, more than \$10 billion annually, was

suspended for 2017 but was set to come back on line for 2018. We suspect this tax might now be suspended indefinitely.

The Executive Order Versus the ACA's Benefit Mandates

Here the issue becomes more difficult. Health plan documents now include the ACA's several benefit mandates (even grandfathered plans include *some* of the mandates). For ERISA employers, ERISA requires plan fiduciaries to administer the plans in accordance with the plans' written terms.

Could plan sponsors simply amend their plans to remove those mandates, especially if the federal agencies responsible for enforcing the mandates say they won't enforce them? Even that isn't as easy as it sounds.

If the plan is *insured* through a group insurance policy, state insurance law likely imposes those same mandates and requires the insurance company to comply with them. Employer/plan sponsors don't have authority to amend the terms of their group policies.

Self-insured sponsors could try to remove the mandates from their plan documents but would risk challenges from employees under the theory that federal law requires plans to honor the mandates that are, after all, imposed on plans through ERISA and other federal laws, and failure to administer the plan accordingly is a breach of fiduciary duty.

Next Steps

Plan sponsors now must await the response from the IRS, DOL and HHS to the executive order. We suspect they will not need to wait long.

And in Other News...the Aetna–Humana Merger

A federal judge this morning brought the pending merger of Aetna and Humana, reportedly a \$37 billion deal, to a halt. The judge was concerned that the merger would hurt competition in the Medicare Advantage market in more than 350 counties. Aetna and Humana may appeal the ruling to a federal appeals court, but there was no indication this morning that the two insurers had made a decision to do so.

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