

# THE SMALL BUSINESS LEGISLATIVE COUNCIL

## ALERT

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### WHAT'S GOING ON WITH HEALTH CARE

Over the past forty-eight hours, the Trump Administration took two significant actions on health care which are clearly intended to undermine the Affordable Care Act (ACA), but which also have the potential to create a great deal of both short- and long-term turmoil and uncertainty in the health insurance sphere.

First, on Thursday morning, the President issued an Executive Order directing the Secretaries of Labor, Treasury and Health and Human Services to “consider proposing regulations or revising guidance” to change certain Obama-era rules and expand the availability of plans that do not meet certain requirements of the ACA. Then, Thursday evening, the Administration announced that it will stop making the cost-sharing payments to health insurers that help reimburse insurers for reduced deductibles, co-pays and out of pocket costs for lower-income individuals enrolled in coverage through the ACA marketplaces.

**Because the Executive Order is just the starting point for regulations to make changes to the ACA framework, it is likely that we won't see its full impact for quite some time. On the other hand, the withholding of the cost-sharing payments could have an immediate impact and may even drive the Democrats to the negotiating table.**

### *Executive Order*

The Executive Order directs the named agencies to look into promulgating regulation or guidance that would do three things:

- 1) ***Expand association health plans.*** Association health plans allow employers and individuals who are part of a common group (such as an industry or trade association) to come together in a single plan (rather than many individual plans). In the Executive Order, the President is seeking to expand the availability of association health plans and allow these plans to be comprised of groups and individuals across state lines.

- 2) ***Expand ability of short-term limited duration plans.*** These plans are intended to help fill the gap when someone is transitioning from insurance plan to another (for example, someone between jobs, or a child who ages off of his or her parent's health insurance). These plans are not treated as individual health insurance coverage for the purposes of the ACA rules, meaning they are subject to less requirements than other plans. Accordingly, the Department of Labor under the Obama Administration put in place rules that limit the period that someone can be on a short-term limited duration plan to three months. President Trump's goal here would be to expand this to allow individuals to stay on these less regulated short-term limited duration plans for a longer period of time.
- 3) ***Expand the rules for health reimbursement arrangements (HRAs).*** Under the existing ACA regulations, most HRAs cannot be used to reimburse premiums for individual health insurance plans. (There is an exception to this for certain types of small business HRAs that the SBLC successfully championed through the passage of the Small Business Healthcare Relief Act). The President's goal in this area would be to amend the rules for HRAs to expand the ways that they can be used and allow them to be used to pay health care premiums.

In short, the Executive Order is a first step towards regulations that would make it easier for people to buy insurance that isn't subject to the full gambit of ACA rules and requirements.

Since the Executive Order was only just issued, it is not clear what the agencies will come up with in response to the President's directives. If the agencies respond by proposing regulations (which is likely), they will need to go through the rulemaking process – which can be slow and difficult.

That said, critics have already begun raising concerns about the impact that these proposals could have on the ACA marketplaces. The overarching concern is that if more people (particularly younger and healthier people) have the option of getting plans that are not subject to all of the ACA requirements (and are therefore cheaper) they will do so, meaning that there will be less young and healthy people in the ACA exchanges, which will raise premiums for those remaining in the exchanges (which would tend to be the older and sicker individuals).

### *Cost-Sharing Payments*

While the Executive Order described above has generally been well received by conservative groups as being consistent with the goal of easing ACA rules despite Congress' failure to pass repeal and replace legislation, the immediate stay of cost-sharing payments is far more controversial.

Most analysts predict that stopping the cost-sharing payments will have a significant impact on the already delicate ACA marketplaces and could result in insurers leaving the marketplaces and premium increases for many participants. Given that the Trump Administration has been threatening to withhold the cost sharing subsidies for some time now, states and insurers have been taking what steps they can to prepare for such a situation which may delay some of the negative results – but only to a limited extent.

In August, the Congressional Budget Office (CBO) estimated that stopping the cost-sharing payments this year would cause insurance premiums to rise by 20% in 2018 and increase the deficit by \$194 billion over 10 years. The reason for the expected deficit increase is that even if the Administration stops making cost-sharing payments, the ACA commits the government to provide financial assistance to help low-income people pay for premiums, meaning if the elimination of the cost-sharing payments drives up premium costs (which it is expected to do) the government will be responsible for greater premium subsidies.

In light of these numbers, even the U.S. Chamber of Commerce, which has traditionally been opposed to the ACA, has been a vocal proponent for continuing the cost-sharing payments. On the Hill, many Republican members are also very nervous that if the Administration does permanently stop the cost-sharing payments it could be very damaging for them in the 2018 mid-term elections.

The most likely path forward on this issue is reflected in the reasoning that the Administration has given for not making the payments. Specifically, the Administration has stated that, because Congress has not specifically appropriated money for the cost-sharing payments, the Administration cannot lawfully make the payments. This means that the pressure now turns to Congress to figure out how to handle the issue – which appears to have been the President's intent. We've recently seen him do this in other areas, including with DACA and the Iran nuclear deal.

Senators Lamar Alexander (R-TN) and Patty Murray (D-WA) are said to be close to having negotiated a bi-partisan bill that would continue the cost-sharing payments in exchange for allowing certain flexibility on ACA rules at the state level. However, today Office of Management and Budget Chief Mick Mulvaney indicated that the President may not be willing to support the narrower Alexander-Murray bill and may, instead, be looking for larger concessions from the Democrats in areas like partial ACA repeal or funding for the border wall. With the temporary funding bill for the federal government expiring on December 8, 2017, it is possible that the President may be willing to strike a short-term deal to continue the cost-sharing payments through that time and then use them as leverage in the larger funding battle to come.

The one thing that is virtually certain is that this move will generate a number of lawsuits. In fact, there is already an open case that might come into play. This case originated out of a challenge by the Republican Congress which was arguing that the Obama Administration didn't have the authority to make cost sharing payments without an express appropriation. The administration changed when this case was pending and the Trump Administration hasn't taken any action on it. However, this summer, a number of Democratic state attorneys general intervened in the case to take over the argument in support of the cost-sharing payments that was previously being made by the Obama Administration. These attorneys general could now seek a court order to require the Trump Administration to keep making the cost-sharing payments to maintain the status quo while the underlying case plays out. Whether the court would grant that request is anyone's guess. Even if the attorneys general are unsuccessful in using the current case as a vehicle to address the issue, we are sure to see other cases from states and insurers in the event that a deal isn't struck and the cost-sharing payments continue to be withheld.