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Future of Affordable Care Act Week 8: Employer's Guide to Collapse of American Health Care Act (Spoiler Alert—News is Not all Bad)

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The stunning failure of the U.S. House of Representatives to pass the ***American Health Care Act (AHCA)*** (which we previously reported on here) has political and policy implications that we cannot forecast. Nor it is it clear to us whether or when the Trump administration and Congress will make another effort to repeal and replace, or whether Republicans will seek Democratic support in an effort to "repair," the Affordable Care Act (ACA). And we are similarly unable to predict whether and to what extent the AHCA's provisions can be achieved through executive rulemaking or policy guidance. The purpose of this post is not to assess why the AHCA failed, or to speculate on the outcome of any future legislative efforts to repeal and replace the ACA, but rather to offer some thoughts about how the AHCA's failure will impact employers in the near term. As our title suggests, the news may not be all that bad.

Immediate Impact on Employers

Employers were not a major focus of the architects of the ACA, nor were they a major focus of those who crafted the AHCA. This is not surprising. These laws address health care systems and structures, especially health care financing. Rightly or wrongly, employers have not been viewed by policymakers as major stakeholders on those issues. In a blog post published at the end of 2014, we made the following observations:

> The ACA sits atop a major tectonic plate of the U.S. economy, nearly 18% of which is health care-related. Health care providers, commercial insurance carriers, and the vast Medicare/Medicaid complex are the law's primary stakeholders. They, and their local communities, have much to lose or gain depending on how health care financing is regulated. The ACA is the way it is largely because of them. Far more than any other circumstance, including which political party controls which branch of government, it is the interests of the ACA's major stakeholders that determine the law's future. And there is no indication whatsoever that, from the perspective of these entities, the calculus that drove the ACA's enactment has changed. U.S. employers, even the largest employers among them, are bit players in this drama. They have little leverage, so they are relegated to complying and grumbling (not necessarily in that order).

With the AHCA's collapse, the ACA remains the law of the land for the foreseeable future. The AHCA would have zeroed out the penalties on "applicable large" employers that fail to make qualified offers of health coverage, but the bill's failure leaves the ACA's "play or pay" rules in full force and effect. The ACA's reporting rules, which the AHCA would not have changed, also remain in effect. This means, among other things, that many employers, especially those with large numbers of part-time, seasonal, and temporary workers that face unique compliance challenges, will continue to be in the position of "complying and grumbling."

This does not mean that nothing has changed. The leadership of the Departments of Health and Human Services, Labor and Treasury *has* changed, and these agencies are now likely to be more employer-friendly. Thus, even though the ACA is still the law, the regulatory tone and tenor may well be different. For example, although the current complex employer reporting rules will remain in effect, the Treasury and IRS might find administrative ways to simplify them. Similarly, any regulations issued under the ACA's non-discrimination provisions applicable to insured health plans (assuming they are issued at all) likely will be more favorable to employers than those issued under the previous administration.

There are also unanticipated consequences of the AHCA's failure that employers might applaud. We can think of at least two.

- ***Stemming the anticipated tide of new state "play or pay" laws***

The continuation of the ACA's employer mandate likely will put on hold consideration by state and local governments of their own "play or pay" laws.

In anticipation of the repeal of the ACA's employer mandate, the Governor of Massachusetts recently introduced a budget proposal that would that would reinstate mandated employer contributions to help cover the costs of increased enrollment in the Medicaid and Children's Health Insurance Program, known as MassHealth. Under the proposal, employers with 11 or more full-time equivalent employees would have to offer full-time employees a minimum of $4,950 toward the cost of an employer group health plan, or make an annual contribution in lieu of coverage of $2,000 per full-time equivalent employee. While the Governor's proposal is not explicitly conditioned on repeal of the ACA's employer mandate, the ACA's survival may prompt a reconsideration of that approach.

California lawmakers were also considering ACA replacement proposals, including a single-payer bill introduced last month by Democratic assemblyman Heath Flora and state senator Toni Atkins. Had the ACA's employer mandate been repealed, those proposals were likely just the tip of an iceberg. When the ACA was enacted in 2010, Hawaii, Massachusetts, and San Francisco were the only jurisdictions with their own health care mandates on the books. But in the prior two-year period, before President Obama was elected and made health care reform his top domestic priority, more than two dozen states had introduced various "fair share" health care reform bills aimed at employers.

Most of the state and local "play or pay" proposals would have required employers to pay a specified percentage of their payroll, or a specified dollar amount, for health care coverage. Some required employers to pay employees a supplemental hourly "health care" wage in addition to their regular

wages or provide health benefits of at least equal value. California, Illinois, Pennsylvania, and Wisconsin considered single-payer proposals.

To be sure, any state or local “play or pay” mandates would be subject to challenge based on Federal preemption under the Employee Retirement Income Security Act (ERISA). While some previous “play or pay” laws were invalidated under ERISA (e.g., Maryland), others (i.e., San Francisco) were not. In sum, given the failure of the AHCA, there would appear to be no rationale, at least for now, for any new state or local “play or pay” laws to go forward.

- ***Avoiding upward pressure on employer premiums as a result of Medicaid reforms***

The AHCA proposed to reform Medicaid by giving greater power to the states to administer the Medicaid program. Under an approach that caps Medicaid spending, the law would have provided for “per capita allotments” and “block grants.” Under either approach, the Congressional Budget Office (CBO), in its scoring of the AHCA, predicted that far fewer individuals would be eligible for Medicaid. According to the CBO:

> CBO and JCT estimate that enacting the legislation would reduce federal deficits by $337 billion over the 2017-2026 period. That total consists of $323 billion in on-budget savings and $13 billion in off-budget savings. Outlays would be reduced by $1.2 trillion over the period, and revenues would be reduced by $0.9 trillion. *The largest savings would come from reductions in outlays for Medicaid and from the elimination of the Affordable Care Act’s (ACA’s) subsidies for nongroup health insurance*.

(Emphasis added).

While employers rarely pay attention to Medicaid, the AHCA gave them a reason to do so. Fewer Medicaid-eligible individuals would mean more uncompensated care—a significant portion of the costs of which would likely be passed on to employers in the form of higher premiums. As long as the ACA’s expanded Medicaid coverage provisions remain in place, premium pressure on employers will to that extent be avoided.

Long-Term Impact on Employers

As we conceded at the beginning of this post, it’s not clear how the Republican Congress and the Administration will react to the AHCA’s failure. If the elected representatives of both political parties are inclined to try to make the current system work, however, we can think of no better place that the prescriptions contained in a report by the American Academy of Actuaries, entitled *An Evaluation of the Individual Health Insurance Market and Implications of Potential Changes*. (We reported on this paper in an earlier post.)

The actuaries’ report does not of course address, much less resolve, the major policy differences between the ACA and the AHCA over the role of government—in particular, the extent to which taxpayers should be called on to fund the health care costs of low-and moderate-income individuals, and whether U.S. citizens should be required to maintain health coverage or pay a penalty. And even if lawmakers can reach consensus on those contentious issues, they still would have to agree on the

proper implementing mechanisms. But whatever the outcome, employers are unlikely to play a major role.

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