Trump Issues Executive Order on Healthcare

On October 12, 2017, President Trump issued an executive order on healthcare. The operative provisions of the order relate to association health plans (AHPs), short-term limited duration insurance (STLDI) and health reimbursement arrangements (HRAs). While the order does not have any immediate impact on existing law or regulations, it directs the federal regulatory agencies (the Departments of Treasury, Labor and Health and Human Services) to consider drafting new regulations that could ultimately have significant impact on health insurance markets.

Association Health Plans (AHPs)

The executive order instructs the Department of Labor to consider regulations that would expand the availability of AHPs under the Employee Retirement Income Security Act of 1974 (ERISA). The intent seems to be to allow groups of unrelated employers in the same line of business to band together to form group health plans that would conceivably be free from certain state regulation and could be marketed across state lines. It could also potentially allow groups of small employers to form large group health plans, thus circumventing the more stringent mandates under the Affordable Care Act (ACA) that apply to health insurance plans sold in the small group market.

Short-Term Limited Duration Insurance (STLDI)

The second part of the executive order directs the agencies to consider regulations expanding STLDI coverage. Short-term coverage is generally not subject to the ACA's insurance market reform mandates, including the guaranteed issue and renewability requirements, age-rating and cost-sharing limits, annual and lifetime limits, prohibitions of preexisting condition exclusions, and other consumer protections. In fact, many STLDI policies cost significantly less than ACA-compliant coverage because they limit certain benefits and tend to have higher deductibles, coinsurance and out-of-pocket limits.

Current regulations limit the duration of STLDI coverage to a period of less than three months. Prior regulations allowed for STLDI coverage to continue for up to 12 months.

Short-term coverage is not considered "minimum essential coverage" under the ACA. Therefore, individuals who only have STLDI will not be in compliance with the ACA's individual mandate and would still be subject to penalties if they go without minimum essential coverage for a period of more than three months. It is not clear whether the Trump Administration intends for regulators to make STLDI minimum essential coverage, thereby eliminating individual mandate penalties for individuals who enroll in short-term coverage.

Health Reimbursement Arrangements (HRAs)

The last part of the executive order directs the agencies to consider regulations to expand the use of HRAs. As a general matter, HRAs cannot be used to reimburse individual health insurance premiums under current law. However, last year, Congress created a narrow exception to this rule for qualified small employer HRAs (QSEHRAs). The exception for QSEHRAs is only is available to small employers (with fewer than 50 full-time equivalent employees). Further, benefits under a QSEHRA must generally be provided on the same terms to all employees (with limited exceptions) and are limited to $4,950 per year for single coverage and $10,000 for family coverage.

Outside of the narrow exception for QSEHRAs, HRAs cannot reimburse individual premiums, and must generally be offered alongside other ACA-compliant group health coverage in order to avoid running afoul of certain ACA mandates, including the preventive services requirements and prohibition on annual limits.

The executive order seems primarily aimed liberalizing the HRA rules and allowing more employers to use HRAs to reimburse individual premiums, although the administration could also push for allowing more generous funding of HRAs.

What does it all mean?

The Trump administration and supporters of the executive order argue that liberalizing the rules for AHPs, STLDI and HRAs would strengthen individual and small group purchasing power by increasing competition and driving down overall premium costs.

But some believe the executive order is part of a broader strategy on the part of the Trump administration, in the wake of Congressional Republicans' recent failure to repeal and replace the ACA, to undermine the ACA by destabilizing the individual insurance markets. In fact, on October 12, 2017, the White House also announced that it will no longer reimburse insurers for cost-sharing reductions (CSRs) provided to lower income individuals who buy coverage through the public Marketplace pending the resolution of *House v. Price* case.

In *House v. Price*, the House of Representatives sued the Obama administration, claiming that the CSR payments to insurers had not been funded through Congressional appropriation and thus were illegal. Many, including the Congressional Budget Office, predict that the effect of ending CSR payments will significantly drive up individual premiums as insurers attempt to recoup the cost of the reductions provided to enrollees. While it is expected that the Trump administration's decision to end CSR payments will be subject to additional legal challenges, Congress could, in the meantime, authorize specific appropriation to fund the CSR payments, thereby resolving the underlying dispute as to their legality.

It is important to reiterate that the executive order is not a change in the law or existing regulations. It merely directs the federal regulatory agencies to consider drafting rules consistent with the intent expressed in the order. However, even the regulatory agencies' authority here is limited. They cannot override existing statutory law through regulations. Further, the regulatory process requires that specific procedures be followed, including first publishing proposed rules and allowing time for public comments before final rules may be published. Any proposed and final rules will also likely need to be reviewed by the Office of Management and Budget. Given the procedural requirements, it is unlikely that the executive order will have any direct impact for many months to come.

That said, as always, we are closely monitoring what is going on in Washington and will alert you as any significant developments occur.