The Affordable Care Act: major actions in 2017 and what to expect in 2018

Healthcare Reform Alert

16 JAN 2018
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Throughout 2017, the Trump Administration and the Republican-led Congress continued to pursue one of the primary pillars in their party’s platform: repealing and replacing the Affordable Care Act (ACA).

While Congress had visualized repeal and replace efforts as the first priority on the agenda in 2017 under the then newly seated Trump Administration, multiple attempts to pass repeal and replace legislation through both chambers of Congress were ultimately unsuccessful. Furthermore, the failure to pass the legislation under Republicans’ watch only further underscored the growing awareness that parts of the law have been successful at garnering public support; while other parts remain highly unpopular, full repeal of the ACA is no longer politically viable.

Although full repeal has lost significant momentum, Congress and the Administration were ultimately able to declare a significant victory at the end of 2017 by successfully including repeal of the individual mandate penalty in the Tax Cuts and Jobs Act of 2017, which essentially revised federal law to apply a zero percentage rate penalty on those who failed to maintain health insurance coverage.

Congress may have failed to repeal and replace the ACA in full by the end of 2017, but President Trump took another route in October 2017, releasing an Executive Order aimed at essentially weakening the law at its most critical points. The EO directed officials in the Department of Health and Human Services (HHS), alongside both
the Departments of Labor and Treasury, to move forward in promulgating certain regulatory changes that began impacting the health insurance markets in 2017. This ongoing evolution will certainly continue on through 2018 and beyond.

The following sets forth those regulatory change directives. As noted, some have had proposed regulations released to date, while others await the same action:

- **Expansion and qualification for use of health reimbursement arrangements (HRA) by small employers**: proposed regulations have yet to be released.
- **Expansion of Short-Term Health Plans**: proposed regulations have yet to be released.
- **Decision regarding continuation (or lack thereof) of cost-sharing reduction (CSR) payments to those insurers sponsoring health plan coverage for low-income Americans**: Bipartisan discussion is currently under way following a preliminary agreement with Senate Majority Leader Mitch McConnell (R-KY) to move two pieces of legislation to stabilize insurance markets, including legislation authorizing CSR payments to insurers.

Despite the upheaval to the ACA-driven health insurance market, the major medical market will continue to thrive in 2018, but in the midst of adjustment to the sudden and arguably drastic changes on the federal level. All states have had to reconcile the ACA’s requirements with their own state-level insurance statutes; while the overall health insurance market is expected to remain intact and relatively stable through 2018, the manner in which CSRs are handled in the coming months could shift that dial of stability in one direction or the other.

Since August 2017, Senators Lamar Alexander (R-TN) and Patty Murray (D-WA) had been working toward a bipartisan compromise to address health insurance market stabilization via authorization of funding for an additional two years of CSR payments to insurers. However, this legislation failed to move on its own through Congress by the end of 2017, a promise that had been made by the GOP in an effort to court the vote of Senator Susan Collins (R-ME) on the comprehensive tax reform bill passed in December 2017.

Since then, Senator Collins has reached a preliminary agreement with Senator McConnell to make good on the GOP’s 2017 promise to shore up and secure health insurance markets by promising to pass two specific bills by the end of 2018.

The two pieces of legislation encompassing the Collins-McConnell agreement would include the aforementioned Alexander-Murray legislation that would formally authorize federal CSR payments to insurers. The second piece of legislation in this agreement is sponsored by Senator Collins, and would include $5.5 billion in federal funding for 2018 – 2020 to help states set up a reinsurance or high-risk pool mechanism for older, sicker individuals to mitigate the premium increases that otherwise would be seen across the board as a result of more costly beneficiaries.

According to Senator Collins, her goal is to ensure this legislation is passed successfully through Congress and signed into law in advance of the deadline later this year by which time insurers must set their 2019 health insurance premium rates. With the current focus of Congress squarely on the January 19 deadline to pass another stopgap spending bill in order to avert a government shutdown, there is currently little insight as to when these bills might move through Congress; however, the growing comfort among lawmakers on both sides of the aisle to ensure stable health insurance markets lends to the belief that, with some discussion and compromise, these bills will pass successfully at some point this year. Federal changes to the ACA are currently being undertaken on a piecemeal basis, but, in the context of the ACA’s comprehensive framework, they have the potential to destabilize health insurance markets, particularly the individual market, with the outstanding question of whether any destabilization that occurs would be temporary or could deal a fatal blow to the health insurance markets. Despite the possibility for market destabilization, health insurers may be able to weather the storm as certain federal regulatory requirements on health insurance products and pricing relax or disappear.

We expect the ongoing policy and regulatory changes being contemplated through 2018 will continue to impact the evolution of the ACA and, therefore, its impact on the healthcare market, in ways that are both expected and unexpected. More specifically, it is very difficult for lawmakers and regulators alike to predict how various policy changes will ultimately translate with respect to influencing retention, or lack thereof, of healthy individuals within the health insurance risk pools. Most notably, any change that leads numerous healthy individuals to exit the individual market will have amplified effects, where premium increases are concerned, which could also serve to destabilize an already fragile market.
Following the definitive failure of the 2017 effort to repeal and replace the ACA in full, it remains highly unpredictable how Republicans and Democrats will move forward on healthcare following any move to address market stabilization. What has become clear is that Republicans have heard the message loud and clear that certain portions of the ACA are wildly popular and successful, while other aspects must be addressed and corrected; however, any attempt to do so during the 2018 mid-term election year, expected to be the most politically contentious we've ever seen, would be a risk neither Republicans or Democrats are likely to take.

At this juncture, what is clear is the willingness of members of Congress, in both houses and on both sides of the aisle, to gain a very intimate and thorough understanding of the potential pitfalls that can be expected as the ACA continues to evolve, and how constituencies will react to that evolution. Moreover, President Trump has at times made comments that were viewed as negative towards the health insurance industry, while later walking back those comments. What we've come to understand about President Trump is his ability to give Congress a larger goal to achieve and leave it to them to do so; he doesn't necessarily have a specific goal in mind for the health insurance industry, positive or negative, but rather has a goal of being able to say at the end of his Presidency that he achieved both healthcare reform and stability, as well as tax reform.

Finally, no change can come about without first having open lines of communication and discussion. As the effort to find stable ground in our healthcare market continues, it will require continued communication with relevant members of Congress on the part of insurers, providers and patient advocacy groups if those entities are to ensure the most positive outcome in this long-term exercise to shore up America's healthcare system during a very critical time.

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