Ogletree Deakins

Rubber, Meet Road: The Arduous Task of Translating Campaign-Talk into Action to Repeal (and Replace?) Obamacare

January 26, 2017

By Stephen A. Riga and Timothy G. Verrall

The creation and implementation of the Patient Protection and Affordable Care Act (ACA or Obamacare) was a long, strange trip beset throughout by policy disagreements, shifting political winds, backroom legislative dealings, unexpected costs, legal challenges, and public relations fiascos. It should then come as no surprise that the Trump administration and the new Congress have experienced a similarly bumpy ride thus far in their efforts to dismantle the ACA.

The creation and implementation of the Patient Protection and Affordable Care Act (ACA or Obamacare) was a long, strange trip beset throughout by policy disagreements, shifting political winds, backroom legislative dealings, unexpected costs, legal challenges, and public relations fiascos. It should then come as no surprise that the Trump administration and the new Congress have experienced a similarly bumpy ride thus far in their efforts to dismantle the ACA.

Candidate Trump promised to repeal the ACA and replace it with something "better": less expensive, more comprehensive, and simpler. However, as the post-election wrangling has demonstrated, "repeal and replace" is a concept much easier advocated from the campaign stump than acted upon in the halls of Congress, particularly when every interested party seemingly has its own strongly-held views about what the better, faster, cheaper alternative should be.

While Congressional Republications have effectively teed up the "repeal" part of the repeal and replace process by passing a roadmap for repealing much of the ACA through the Committee on the Budget's Fiscal Year 2017 Reconciliation (including ambitious legislative targets to introduce proposed statutory language before the month's end), no clear consensus has yet emerged about the timing of the replacement or its substance. President Trump has indicated that a more comprehensive plan is in the works with the goal of

providing coverage to "everybody." The "insurance for everyone" plan may or may not align in its general design or details with the various proposals under consideration in Congress and has yet to be unveiled to Republication leadership. The Senate has been conducting confirmation hearings for agency heads who are sure to play a role in the administration's approach to ACA replacement But the hearings so far have provided little insight into how the U.S. Department of Health and Human Services (HHS), Internal Revenue Service (IRS), and Department of Labor (DOL) will act or the likely end result of this process.

The president's recent (and first) executive order, signed on January 20, 2017, is perhaps more aspirational than directive. It supports the repeal and replace process and hints at the administration's intent to attack the ACA problem from both legislative and administrative fronts, albeit with limited practical guidance for employers. In broad terms, the order emphasizes the administration's view that the ACA should be repealed and replaced on an expedited basis *but* that pending the outcome of that process, the ACA should be implemented and applied in an efficient manner that minimizes its "unwarranted economic and regulatory burdens." In addition, the order directs the applicable federal agencies (i.e., the HHS, IRS, and DOL) to exercise *all* available discretion and authority, including:

- to "waive, defer, grant exemptions from, or delay the implementation" of any ACA requirements that impose financial burdens on the states, or any fee, cost, regulatory burden, or the like on any individual or family, healthcare provider, health insurer, purchaser of health insurance, recipient of medical care, or medical device or pharmaceutical manufacturer;
- to liberalize any ACA requirements limiting state-level discretion to implement and provide healthcare benefits; and
- to encourage the development of "free and open" insurance and healthcare markets across state borders.

For employers, the first of the directives is probably of most immediate interest as it suggests that many of the complex compliance tasks they have been saddled with since 2011 have been vanquished with the stroke of the president's pen, with all deadlines deferred, penalties waived, and regulatory watchdogs safely confined to their kennels. However, before popping any celebratory corks (or shredding any draft 1095-Cs), employers may want to remember that the bulk of guidance offered in support of the major ACA requirements for employers (e.g., the insurance mandates for group health plans, the employer mandate, minimum essential coverage and applicable large employer reporting) was issued in the form of federal regulations that cannot be nullified by executive order. The order obviously expresses political will to move toward a different regime, but it is not self-implementing and, as Congress and the president have discovered, the devil truly is in the details where healthcare reform is concerned.

Until the ACA is officially repealed, it remains the law of the land, and the penalties, taxes, and other consequences it imposes on noncompliance will remain in effect and applicable at least in theory. To the extent that the regulatory agencies responsible for enforcing these requirements follow the directives in the executive order, one might reasonably expect that the continuing risk of audit or penalty will be significantly

lessened, but it is not zero. Further, the personnel who can be expected to actually implement the relief contemplated by the order are either holdovers from the Obama administration or have not yet been hired and may not yet have the sort of clear direction needed to identify which aspects of the ACA under their jurisdiction can be waived and how best to exercise their discretion in furtherance of the order's objectives. In any event, the considerable effort expended by employers to tailor their health plans and administrative practices to comply with the ACA cannot quickly—or cheaply—be reversed, and any attempt to do so in the absence of more concrete guidance from the agencies themselves would be a risky proposition indeed.

Taken together, the president's and Congress's recent actions clearly indicate that the ACA as we have known it is probably a dead letter, but its replacement is very much a work in progress. The ACA was a law almost 25 years in the making, and the current regulatory regime has been under construction virtually since the day the ACA was enacted so, campaign promises aside, it is not unexpected that both the repeal *and* replace aspects of the current legislature and administration may take some time to formalize. However great the temptation to act now (or take a break) in anticipation of the eventual outcome of the repeal and replace process, the most prudent response for the many employers interested in how (or if) this process will affect how they provide health benefits to employees is watchful waiting.

AUTHORS

Stephen A. Riga

Of Counsel, Minneapolis, Indianapolis

Timothy G. Verrall

Shareholder, Houston

TOPICS

Employee Benefits and Executive Compensation, Governmental Affairs