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White House Directs Departments to Consider New ACA Rules; Stops Cost Sharing Subsidies

An executive order signed by the president on October 12 directs the departments of Treasury, Labor, and Health and Human Services to consider new regulations for health reimbursement arrangements; association health plans; and short-term, limited-duration health insurance. The White House also announced that it would discontinue cost-sharing reduction payments to insurers. These actions could have implications for employers and their group health plans, in addition to the individual marketplaces.

Week in Review

Last week, the White House issued an executive order (EO) that directs the departments of Treasury, Labor (DOL) and Health and Human Services (HHS) to consider new (and reconsider old) rules relating to health reimbursement arrangements (HRAs), association health plans (AHPs) and short-term and limited-duration insurance.

Additionally, the administration will not appeal a federal court's decision, finding the use of federal funds for ACA marketplace coverage cost-sharing subsidies (i.e., cost-sharing reduction, or CSR, payments) to be improper. Based on a legal opinion from the Department of Justice (DOJ), HHS announced that it would immediately discontinue CSR payments. For more information on this litigation, see our June 12, 2017 *Legislate.*

Executive Order

In the absence of congressional action, the White House issued an executive order (EO), Presidential Executive Order Promoting Healthcare Choice and Competition Across the United States, directing the departments to study existing and consider new rules. The administration hopes to "expand the availability of and access to alternatives" to ACA marketplace coverage, as well as "increase competition to bring down costs for consumers."

Health Reimbursement Arrangements

The EO seeks to expand the availability and utility of HRAs by directing the departments to provide guidance that would allow greater flexibility for these arrangements. Currently, regulatory guidance limits the utility of HRAs. Subject to limited exceptions

(e.g., retiree-only HRAs), IRS rules generally prohibit the use of HRA funds to purchase individual health insurance on a tax-favored basis, because unless it is integrated with qualifying employer-sponsored group health coverage, it will fail to satisfy ACA market mandates. An HRA for active employees will be considered integrated if it's made available only to those employees who are enrolled in the employer's comprehensive group health plan coverage. HRAs are prohibited from being integrated with individual coverage or used on a "standalone" basis as a means of purchasing health coverage (e.g., in the individual marketplace). (For more information on the rules limiting HRAs see our February 21, 2013 *For Your Information*.) The EO asks the departments to consider proposing regulations or revising guidance, "to the extent permitted by law and supported by sound policy," to expand employers' ability to offer HRAs to their employees, and to allow HRAs to be used in conjunction with non-group coverage.

Qualified small employer health reimbursement arrangements (QSEHRAs), authorized by the 21st Century Cures Act (Dec. 2016), allow certain small employers to offer a special type of stand-alone HRA to help employees pay for medical care expenses on a pre-tax basis – including the purchase of individual-market, major medical insurance coverage. These arrangements avoid the ACA's prohibition on "employer payment plans" (i.e., employer payment of individual insurance premiums). Under the statute, a QSEHRA is not considered a group health plan. To date, the departments have not issued guidance on QSEHRAs.

> **Comment.** It's possible that the departments could re-think their position (and guidance they have issued) on HRAs. As noted above, thus far, they have taken a narrow view of how HRAs fit within the ACA market mandates and require that an HRA be "integrated" with other coverage that complies with these mandates.

Association Health Plans

The EO directs the DOL to issue guidance that would expand access to health coverage by allowing small employers to purchase health insurance across state lines through AHPs. The EO states that the DOL should broaden its interpretation of the conditions necessary to satisfy the "commonality-of-interest" requirement with respect to the definition of "employer" under ERISA. Through this approach, trade associations could offer health insurance to employees of member companies. The idea is that if employers can band together, it will create larger risk pools and potentially create broader access to health coverage at lower rates.

Short-Term, Limited-Duration Insurance

The EO also suggests expanding the availability of short-term, limited-duration insurance that is not subject to the ACA's market reforms and is generally less expensive. Existing rules permit an individual to have such coverage as long as it is limited to less than three months. The EO asks the departments to provide guidance (either new or amending existing guidance) to allow for the expansion of this coverage period and renewal.

Termination of Cost-Sharing Reduction Subsidies

Generally, the ACA requires insurance companies to reduce certain out-of-pocket costs (e.g., deductibles, coinsurance) for low-income individuals enrolled in marketplace coverage. The federal government had been reimbursing insurance companies directly for the CSRs they provided to enrollees. (This is separate from the "premium tax credit" subsidies provided under the ACA.) A federal district court had determined that the funding of CSR payments was provided without proper congressional appropriation. The Trump administration decided not to appeal the decision and in a court filing released on October 13, announced that the federal government would cease making ACA CSR payments to insurers and the October 18 payment was not made. Ultimately, the termination of these payments could destabilize the individual marketplaces.

On October 18, 2017, the attorneys general of 18 states and the District of Columbia asked a district court in California for a temporary restraining order and preliminary injunction to compel the administration to continue making CSR payments until the lawsuit they have filed is resolved. This issue continues to evolve.

> **Comment.** This past August, a bipartisan proposal would have brought CSR payments under congressional oversight and appropriations process to ensure funding. (See our August 7, 2017 *Legislate.*) That proposal did not advance. However, Senate Health, Education, Labor and Pensions (HELP) Committee Chairman Lamar Alexander, R-Tenn., and the committee's ranking Democrat, Patty Murray, D-Wash., are working on legislation that could appropriate CSR payments for an additional two years (among other things). While not entirely clear, the White House may be open to such action. A destabilized individual marketplace has an indirect impact on employers – states could try to shift costs to employers and employer-sponsored health plans.

Looking Ahead

The bipartisan deal to stabilize the marketplaces (discussed above) has 24 co-sponsors (12 Republicans and 12 Democrats). The bill language was released by Senator Murray's office, along with a section-by-section summary.

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