AFFORDABLE CARE ACT UPDATE – WHAT’S NEXT IN 2017

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AGENDA

• OVERVIEW OF PENALTY PROCESS
  • § 1411 CERTIFICATIONS
  • IRS ASSESSMENT NOTICE
  • MECHANICS & TIMING OF REPEAL
  • EMPLOYER MANDATE
  • CADILLAC TAX
  • PHSA MANDATES
  • INDIVIDUAL MANDATE AND PCE
  • EXCHANGES & PREMIUM SUBSIDIES

OVERVIEW OF PROCESS

Employer Mandate
• ALE must provide affordable minimum value coverage or pay a penalty
• ALE must complete 1094C/1095C reporting

Individual Mandate
• Individuals must maintain minimum essential coverage or pay a penalty
• Individuals must complete personal tax filing
OVERVIEW OF PROCESS

Individual applies for and receives subsidy
• Employer receives §1411 Certification
• Employer can evaluate and appeal if warranted

IRS receives 1094C/1095C, §1411 Certifications; individuals’ tax filings
• IRS sends “assessment notice” to Employer
• Employer can evaluate and respond if warranted

IRS determines Employer Shared Responsibility liability
• IRS sends demand for payment
• Employer pays

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§1411 CERTIFICATION
• Establishes the procedure for determining individual eligibility for premium tax credits
• Different Exchanges (state vs federal) use different names
• Notice of Employee Eligibility, Employer Eligibility
• Notice of Employer Eligibility
• Notice of Employee Eligibility
• Employer Notice
• Other

What it is:
• Notice that an employee has been determined to be eligible for a premium tax credit

What it is not:
• A determination that the employer will owe a penalty
What should an employer do if they receive §1411 Certification notices?

If the employer is not an ALE:
• Generally no penalty risk for employer – no need to appeal

If the employer is an ALE:
• Evaluate to determine if employee subsidy receipt could pose a penalty risk
• Employee is not ACA-FT, no penalty risk – no need to appeal
• Employee is ACA-FT and was not offered coverage or not affordable, employer should expect to pay a penalty – no need to appeal
• Employee is ACA-FT, coverage was offered and employer believes it is affordable, penalty risk – employer will likely want to appeal

If appealing, communicate with employees. Not required, but will help avoid surprises.

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IRS PENALTY ASSESSMENT

• IRS will adopt procedures to ensure employers receive notifications that one or more employees have received a premium tax credit. Not finalized, but here is how the different moving parts are expected to work together:

  IRS receives:

  • ALEs 1094C/1095C reporting indicating who was ACA-FT and whether affordable MV coverage was offered
  • §1411 Certifications from Exchanges
  • Individuals’ tax filings, which will finalize subsidy eligibility

  • IRS will match up data from these sources to determine if the ALE owes a penalty. If so:

  IRS sends:

  • Notice designed to inform employer of potential liability with an opportunity to respond
  • IRS appeals process is available for an Employer to raise an issue with the IRS after evaluating any response. IRS will send notice and demand for payment
Will the ACA be repealed?

- Trump and Congressional Republicans have promised to "repeal and replace" ACA
- With Republicans in control of the White House and both houses of Congress significant changes to the ACA seem inevitable
- But a "repeal" of the ACA could take many forms, each of which may have different implications for employers and their health plans

FUTURE OF THE ACA

- Congress has begun process of repealing ACA
  - But Republicans have not yet settled on what repeal actually means or how it will proceed
  - "Repeal and replace" – replacement bill passed at same time ACA is repealed
  - "Repeal and delay" – pass bill repealing ACA but then delay repeal (possibly for several years) while a replacement is crafted
  - "Repeal and slowly replace" – repeal and replace portions of ACA incrementally
  - "Repeal and maybe, some day, if we get around to it replace" – pass bill immediately repealing ACA and pass replacement at some point in the future
  - Several ACA repeal/replace bills have already been introduced in Congress
  - Other high profile proposals, e.g. Paul Ryan’s “A Better Way,” have not yet been introduced as bills
  - Administration appears to have a proposal in the works as well
  - Will likely be some time before we have any sense which of these competing proposals are likely to become law
HOW TO REPEAL THE ACA

Legislative Changes

• Congress passes a bill repealing some or all of the ACA, which is signed by President
• Normally require 60 votes to overcome filibuster in the Senate
• Could use budget reconciliation process to repeal at least some portions of the law, which only requires 50 votes
• More drastically, Senate Republicans could eliminate the filibuster but that seems unlikely at this point
• Legislative repeal will take time but would result in most permanent change to the law

HOW TO REPEAL THE ACA

Budget Reconciliation  
50 Votes

• Employer mandate
• Individual mandate
• Cadillac tax
• Health Insurer Fee

Normal Legislative Process  
60 Votes

• Adult child mandate
• Pre-existing condition restrictions
• Annual/lifetime limits
HOW TO REPEAL THE ACA

Executive Order / Non-Enforcement

• President and/or agency heads could issue order directing agencies not to enforce certain provisions of the law, e.g. employer shared responsibility penalties and reporting, individual mandate penalties
• This would not change the law itself but signal that the federal government would simply not pursue collection or enforcement actions against employers
• Note that some provisions of the law, e.g. PHSA mandates, could potentially be enforced by private lawsuit, which would be unaffected by non-enforcement order.
• Could be done almost immediately

January 20, 2017 Executive Order

• To the maximum extent permitted by law, agencies shall exercise all authority and discretion available to them to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the Act that would impose a fiscal burden on any State or a cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products, or medications.
• To the extent that carrying out the directives in this order would require revision of regulations issued through notice and comment rulemaking, the heads of agencies shall comply with the Administrative Procedure Act and other applicable statutes in considering or promulgating such regulatory revisions.

By itself, this order does not require specific changes. Actual changes to the law will come from agencies and may require going through the regulatory process.

Regulatory Changes

• Executive branch agencies issue new regulations and guidance interpreting existing ACA provisions
• Doesn’t result in repeal of the law but could significantly change how certain provisions are implemented or enforced
• “Guidance” could likely be changed almost immediately; “regulations” would likely require notice and comment rulemaking, which would take longer
HOW TO REPEAL THE ACA

State Law

- Many states changed portions of their insurance laws to conform to the ACA
- Repeal of the ACA would not automatically repeal those state laws
- Fully insured plans would still be subject to any such state law mandates unless/until state law is changed

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EMPLOYER MANDATE

- "Play or pay" penalties
- Full-time = 30 hours per week (ACA-FT); look-back measurement rules
- Affordability calculations
- 1094C/1095C Reporting

Stay or Go?

- Cannot certainly go

How & When

- Could be eliminated legislatively by budget reconciliation
- IRS could announce intent not to collect
- Agency action could happen quickly; legislative process would likely take longer

Replacement

- None
EMPLOYER MANDATE

Notes & Comments
If eliminated, do you revert to pre-2015 eligibility criteria?

- What methodology do you use to determine eligibility, e.g. during leaves of absence, FT-to-PT / PT-to-FT employees, variable work schedules?
- Do you revisit scheduling decisions made to keep employees under 30 hours per week?
- Even if affordability no longer triggers a “play or pay” penalty, might affect employee eligibility for premium subsidies if exchange/subsidy structure is maintained.

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CADILLAC TAX & OTHER TAX-RELATED RULES

- Cadillac tax (delayed until 2020)
- Health FSAs (maximum contribution limits, no OTC drug reimbursement)
- W-2 reporting of health coverage
- Additional Medicare tax on high wage earners (0.9% / $200,000)
- PCORI and health insurer fees
- Cadillac tax & W-2 reporting almost certainly go
- Additional Medicare tax & health insurer fees probably go
- Health FSAs & PCORI fees - uncertain
- Almost certainly need to be done legislatively but can probably be done through budget reconciliation
- Unclear whether these items are a priority that would be included in repeal only
- Partial taxation of employer provided health coverage
Some employers made plan design changes in an effort to control future rate increases so as not to exceed Cadillac tax threshold. Are these changes revisited?

Many ACA replacement proposals include a cap on amount that can be excluded from employee's income for employer provided health coverage.

Cap would increase employer income taxes. If cap applies to FICA, would also increase employer FICA taxes. Would cap limit employer's ability to claim premiums as business expense deduction?

Effect of cap would be very similar to Cadillac tax - premiums in excess of cap would be subject to taxation, creating pressure to design plans to stay below the cap.

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PHSA MANDATES

• Coverage for adult children
• Out of pocket maximums
• 100% preventive care
• 90 day waiting period
• No annual/lifetime limits
• No rescission
• Miscellaneous patient protections
• Clinical trial coverage

Stay or Go?

• Elimination would need to be done through normal legislative process but certain specific interpretations, e.g. contraceptive coverage, could be changed administratively.

How & When

• Replacement bill or regulatory agenda

Replacement

• Nueva but may be retained largely as is
PHSA MANDATES

Notes & Comments
To the extent that PHSA mandates are repealed or amended and to the extent permitted by insurance company or TPA, employer will have to decide whether to nevertheless retain the coverage.

Impact on plan costs, employee relations, possible tax ramifications (e.g., without ACA adult child mandate, would coverage for adult children now be taxable income to employee?)

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INDIVIDUAL MANDATES AND PCES

- Individual requirement to have minimum essential coverage
- Guaranteed Issue
- Prohibition on Pre-Existing Condition Exclusions

Stay or Go?
- Individual mandate almost certain to go
- Guaranteed issue and prohibition on pre-existing condition exclusions likely to go or be curtailed

How & When
- Full repeal likely needs legislative action to repeal, but Executive Order may give agencies discretion in permitting exceptions to individual mandate
- Individual mandate can be repealed through budget reconciliation, but guaranteed issue and PCE prohibition may need to be handled through normal legislative process

Replacement
- Individual return to pre-ACA PCE rules under HIPAA, which generally prohibits PCEs
- Individual mandate when employer has sufficiently continuous creditable coverage
- Individual could be replaced with requirement for carriers to offer ACA-compliant plans for individuals who apply outside of an open enrollment period
INDIVIDUAL MANDATES AND PCES

Notes & Comments
Possible that enrollment in employer’s group health plan will decline without the individual mandate, though the ACA replacement may discourage unenrollment through mechanisms like PCE exclusions and medical underwriting.

Employer will need to decide whether or not to implement pre-existing condition exclusions to the extent permitted by law and to the extent permitted by insurance company or TPA; will need to consider employee relations and expectations.

EXCHANGES & PREMIUM SUBSIDIES

Stay or Go?
Almost certain to go

How & When
Almost certainly need to be done legislatively but can probably be done through budget reconciliation. Seems likely will be phased out over time, maybe several years.

Replacement
Potentially a state-based system, or potentially no replacement.

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EXCHANGES & PREMIUM SUBSIDIES

- Individual and small group health insurance marketplaces
- Premium subsidies
- Cost-sharing assistance

Stay or Go?
Almost certain to go

How & When
Almost certainly need to be done legislatively but can probably be done through budget reconciliation. Seems likely will be phased out over time, maybe several years.

Replacement
Potentially a state-based system, or potentially no replacement.
EXCHANGES & PREMIUM SUBSIDIES

Notes & Comments

- Employer would not be subject to any employer shared responsibility penalties if employees not eligible for premium subsidies
- Availability and cost of employer coverage may continue to affect employee eligibility for subsidy as long as the subsidy regime continues to exist
- Employer may need to amend cafeteria plan to eliminate special election change rules relating to the exchanges
- Employer may be relieved of obligation to provide disclosure to new employees about the exchanges

LESSONS

Lessons

1. Don't assume repeal of ACA means everything is going away immediately - all the tax and some pain is likely to stay.
2. Employer will be faced with many plan design and employee relations choices once we know which parts of the ACA are going away.
3. Conservative approach is to continue to comply with existing ACA requirements, at least for now, and we would advise but employers may have to make calculated business judgment - there is a significant cost to complying.

THANK YOU!

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