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Election Results and the ACA: Preliminary Thoughts



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With the outcome of the 2016 elections now official, the Republicans will hold the majority in both chambers of Congress and control of the White House beginning in 2017. Since President-elect Trump ran on a platform of “Replace and Repeal” of the Affordable Care Act (ACA), we anticipate that acting on this campaign promise will be one of the top priorities of the new Trump administration. We anticipate there will be significant disruption for individuals, employers, brokers and carriers across the country.

Republicans will likely need to use the process of Budget Reconciliation to pass legislation through the Senate, given the party did not secure enough seats to control a filibuster-proof supermajority. In other words, the legislation can pass in the Senate with a simple majority vote and not a super majority (which requires 60 votes). Reconciliation can be used to take away some, but not all, of the ACA. It is anticipated that certain provisions of the ACA would be targeted such as Medicaid expansion, the availability of subsidies and premium tax credits in the Marketplace, and the employer and individual mandate. It cannot be used to remove non-budgetary provisions (for example, insurance mandates like “to age 26”). In addition, it is conceivable that a Trump administration may simply direct various federal agencies (such as the Department of Labor) to not enforce certain ACA provisions.

The Republicans have not laid out a specific plan on what will replace the ACA. Generally, the party has supported the existing employer-based system (with some party members calling for limits on the tax exclusion). Based on published white papers on the President-elect Trump's website, other aspects of a healthcare overhaul plan may include:

- Tax credits for purchasing individual health insurance;
- Expansion of Health Savings Accounts and High Deductible Health Plans;
- Continuation of the prohibition on pre-existing condition exclusions from health insurance;
- High risk pools;
- Interstate sales of insurance; and
- Medical malpractice reform.

The process to repeal and replace the ACA will take time and nothing will happen between now and the New Year. Open enrollment is currently underway in the Marketplaces across the country and it is expected that individual policies (and subsidies for lower and middle-income individuals) will be available to enrollees as of January 1, 2017. What is unknown is whether the Trump administration and subsequent legislation will affect the Marketplace and subsidies in mid-2017 or instead phase out this coverage after the 2017 calendar year.

Right now it is too early to tell how all of this will play out. However, for employers preparing for their 2017 plan year renewals, nothing has changed. Employers should be prepared to comply with the various requirements including:

- The employer mandate (for applicable large employers);
- Form 1094-C and 1095-C reporting for Calendar Year 2016;
- Any ACA taxes and fees for self-funded plans to pay directly (such as reinsurance fees); and
- Plan design changes applicable to plan years that begin on or after January 1, 2017.

In addition, all other federal law mandates impacting employer health and welfare plans such as ERISA, HIPAA, COBRA, Code Section 125, the Mental Health Parity and Addiction Equity Act, and the Service Contract Act / Davis Bacon and Related Acts are still good law. There has been no indication that these non-ACA laws are targeted for repeal or replacement.

We are carefully following these political developments and will keep you updated on next steps.