

ONE YEAR LATER: A HEALTH REFORM STATUS UPDATE

March 23, 2011

On March 23, 2010 President Barack H. Obama signed into law the Patient Protection and Affordable Care Act (Affordable Care Act), better known as the health reform law. Hotly-contested in Congress for over a year, this legislation is expected to bring about the most dramatic and sweeping changes to the nation's health care system since the enactment of the Medicare and Medicaid programs in 1965. This HealthPass Health Reform Update serves to chronicle the health reform-related events that have transpired in the year since the legislation was approved by Congress. Some of these actions were intended to bolster industry and public support for the landmark law while other approaches were employed to undercut its legitimacy and future implications.

BACKGROUND

Health reform implementation is designed to be an iterative process that will unfold throughout the next decade. In the year that has passed – one marked by a shift in power in Congress that has led to partisan rancor over implementation details of certain provisions as well as varied legal challenges to the law – numerous stakeholder groups including consumers, employers, brokers, health insurers, hospitals, and physicians have undoubtedly already felt the effects. What follows is a discussion of what's ensued in the health reform law's first year as well as a prospectus of what's to come.

OVERVIEW OF PROVISIONS NOW IN EFFECT

At the forefront of the law's first year was a partial reconfiguration of the private health insurance marketplace. The remainder of these provisions designed to reconceptualize the way in which consumers purchase and interact with health insurance will be implemented in 2014 when health insurance exchanges (Exchanges) open their doors. Many elements of this year's restructuring were designed to provide consumers and small employers with tangible and highly visible benefits that also help set the structural stage for the broader coverage expansion effort that

KEY POINTS:

- Health reform implementation will unfold over the next decade, but much has transpired in only its first year.
- The first year of health reform was marked by partisan debate over implementation details and characterized by a partial reconfiguration of the private health insurance marketplace.
- Acknowledging that the health reform law isn't perfect, both chambers of Congress have introduced legislation to alter the statute.
- Three proposed changes to the health reform law have reasonable chances of being considered for passage: a repeal of the 1099 provision, a bill excluding broker/agent fees from the medical loss ratio calculation, and an acceleration of state innovation waivers.
- Over two dozen lawsuits challenging the health reform law have been filed, with three federal judges ruling in favor of the law and two other federal judges striking it down.
- Year two of health reform implementation will focus on debating and developing details related to provisions of the law that will result in industry-wide structural changes in later years.

occurs in 2014. The provisions that took effect this year include:

- A tax credit for small businesses that provide health insurance to their workforce;
- A state-run temporary high-risk pool insurance program;
- The extension of dependent coverage up to age 26;
- Restrictions on annual dollar limits and a prohibition on lifetime dollar limits;
- A prohibition on pre-existing condition exclusions for children under age 19;
- Restrictions on reimbursements from savings accounts for over-the-counter medication;
- A prohibition on coverage rescissions except in cases of fraud;
- Enhanced claims appeals processes;
- A requirement for certain preventive services to be covered without cost-sharing;
- Minimum medical loss ratio requirements for health insurance carriers;
- Rebate checks for seniors to help pay the cost of prescription drugs when they reach the Medicare Part D “donut hole” coverage gap; and
- The creation of a temporary reinsurance program to help employers pay for early retirees’ health care coverage

CONGRESSIONAL ACTION TO AMEND THE LAW

In gearing up to challenge Democrats for both House and Senate majorities, Republicans made opposition to the Affordable Care Act one of their central campaign promises. Thus, it came as no surprise when House Republicans, along with three

Democrats, voted to repeal the health reform law in its entirety on January 19, 2011. The measure failed, however, when it was voted on in the Senate on February 2, 2011.

Following this successful vote, House Republicans approved H.R. 9 by a vote of 253-175, which instructs the four major committees with jurisdiction over health care – Ways and Means, Energy and Commerce, Judiciary, and Appropriations – to draft legislation to replace the existing law.

In response to public opinion polls indicating that most Americans are not in favor of repealing the entire bill, Republicans in both chambers of Congress have introduced a flurry of other bills aimed at repealing specific provisions of the Affordable Care Act, such as the excise tax on medical devices, the Community Living Assistance Services and Support Act (CLASS Act), the employer mandate, and the Independent Payment Advisory Board (IPAB). All of these bills certainly face an uphill battle and would likely be vetoed by the President if they were to even reach his desk.

Yet other legislative changes to the Affordable Care Act carry legitimate provenance and face relatively realistic prospects for passage. These proposals are highlighted below.

1099 Repeal

Galvanized by explicit support from the Obama Administration, the 112th Congress has made repealing the so-called 1099 provision – a requirement that all businesses file a 1099 reporting form with the IRS for any purchases worth more than \$600 in aggregate in one year – a priority in its first few months. Although this repeal bill enjoys significant bipartisan support, Republicans and Democrats are in a showdown over how to pay for this revenue-generating provision.

The Senate voted 81-17 to approve an amendment to the FAA reauthorization bill that would repeal the 1099 provision from the bill and charges the White House Office of Management and Budget to identify unallocated discretionary funds to pay for it. Not too long after the Senate vote, the House passed their version by a margin of 314-112. The House measure would be paid for by requiring recipients of advance premium assistance tax credits to repay an even greater share of any overpayment of the tax credits. Experts agree that the divided Congressional chambers will eventually reach agreement on the legislation and that the President will sign it into law.

Excluding Broker Commissions from MLR Calculations

A proposal to exclude the fees paid to brokers and agents from the medical loss ratio calculation has been introduced in the House and enjoys bipartisan co-sponsorship. While enjoying strong momentum in the House, the legislation is expected to be stalled in the Senate and its receptivity by some Republicans is uncertain lest they affirm that the health reform law is structurally sound, but simply needs minor corrections.

State Innovation Waivers

In an address to the nation's governors on February 28, 2011, President Obama endorsed a bill introduced by Sens. Ron Wyden (D-OR) and Scott Brown (R-MA) that would allow states to apply for State Innovation Waivers in 2014 instead of in 2017 as currently stated in the Affordable Care Act. A waiver would allow a state to opt out of certain elements of the reform law so long as their state-based reform alternative provides coverage to as many or more people than envisioned under the federal reform law and does not increase the federal budget deficit.

LAWSUITS CHALLENGING HEALTH REFORM

The majority of the over two dozen legal challenges to the Affordable Care Act focus on the constitutionality of the law's individual mandate. Parties to the challenges argue that the Commerce Clause of the US Constitution does not grant Congress the authority to require individuals to maintain insurance coverage and that such a requirement amounts to federal regulation of economic inactivity, an unprecedented power.

At the one-year mark of the Affordable Care Act, three federal circuit judges have ruled in favor of the constitutionality of the individual mandate and two have struck it down and thus ruled the provision unconstitutional. Because the Affordable Care Act does not include a severability clause – a provision stating that if one portion of the law is struck down other provisions of the law shall remain in effect – the judges who ruled against the individual mandate have also had to determine if it is severable from the rest of the law.

Because lower courts are expected to split their rulings on the challenges, the Supreme Court of the United States is expected to have the final say about the law's validity. Observers and experts anticipate the case reaching the nation's highest court within the next 18 months, with a decision coming in the middle of the 2012 elections.

WHAT'S IN STORE FOR YEAR TWO?

Much of the action in the law's second year will center on regulatory activity aimed at promulgating regulations related to structural changes that take effect in later years, which include the following reform provisions:

- The definition of minimum essential benefits: the mandatory package of benefits that must be covered by all health plans beginning in 2014
- Regulations governing the eventual establishment of state-based health insurance exchanges in 2014
- The individual and employer mandates that take effect in 2014; and
- Accountable care organizations (ACO): innovative new delivery systems whereby disparate providers integrate to form clinical teams accountable for patients' complete course of care

In addition, two important yet less noticed provisions of the Affordable Care Act take effect in 2011. One is a prohibition on discrimination in favor of highly compensated employees that, under health reform, now applies to fully-insured groups as well as self-insured ones. The second is the creation of a new type of cafeteria plan called a SIMPLE cafeteria plan.

This new arrangement allows small employers to avoid a number of various non-discrimination requirements applicable to traditional cafeteria

plans. Employers eligible to establish a SIMPLE cafeteria plan are those with an average of 100 or fewer employees during either of the preceding two years. All employees who had at least 1,000 hours of service during the previous plan year must be eligible to participate. And, all employees must have the same election rights under these plans. But, certain employees may be excluded. Regardless of whether the employee makes a contribution, employers are required to make a contribution that is either a uniform percentage (but not less than 2%) of the employee's compensation for the year or a matching contribution that is an amount not less than the lesser of 6% of the employee's compensation or twice the amount of the salary reduction contributions of each qualified employee. It is important to note that the matching contribution cannot be greater for highly compensated individuals or key employees.

ADDITIONAL INFORMATION

To access additional health reform materials relevant to brokers and small businesses, please visit the health reform section of our website at www.HealthPass.com.

For more information or if you have questions, please contact Shawn Nowicki, Director of Health Policy at snowicki@healthpass.com.

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