



Health Care Update Carolyn E. Smith

Lawyers and Administrators Meeting
April 11, 2019
Washington, DC





Federal agency update



- HRA Proposed Rules
- Section 1557 Proposed Rules
- 2020 Notice of Benefit and Payment Parameters
- RFI on Grandfathered Plans
- Other



HRA Proposed Rule: Published Oct. 29, 2018

- Issued pursuant to Executive Order
- Significantly expands the ability to use HRAs
- Two new types of HRAs:
 - Individual Market HRAs: Allows HRAs to be used to purchase individual market insurance (other than short-term and excepted benefits) and reimburse other medical expenses. Counts as MEC for purposes of employer responsibility provisions. A traditional group health plan may not be offered to the same classification of employees eligible for the HRA. Different groups include less than age 25, collectively bargained employees, full-time, part-time, seasonal ... and maybe others.
 - Excepted benefit HRAs: Employee would have to be offered traditional health insurance. Could not also be eligible for an individual market HRA. Allows reimbursement of medical expenses, including COBRA, short-term, and excepted benefit premiums, but not other group or any individual market premiums. Limited to \$1,800 per year (excluding carry over).
 - Comment period closed Dec. 28, 2018.
 - NCCMP submitted comments.
- **Current status: In progress. Next step, OMB review. Final rule has not yet been sent to OMB.**



HHS Notice of Benefit and Payment Parameters for 2020

- Mostly deals with fully-insured and exchange-based plans
- Sets OOP limits for all plans for 2020 – proposed at \$8,200 single/\$16,400 family
- Contains provisions aimed at encouraging use of generic Rx (e.g., modifications to EHB rules, expanding ability to exclude Rx manufacturers coupons from OOP)

Current status: Expected soon. Final rule has been under OMB review since 3/22/2019

RFI on Grandfathered Plans

- Pre-rulemaking
- Asks for information to help inform possible future rule-making making it easier for plans to maintain GF status
- IFEB survey data estimates 57% of multiemployer plans are GF, compared to 20% of corporate plans, and 30% of public plans
- NCCMP submitted comments

Current status: No particular deadline. Could see proposed rules in the future.



Section 1557 Non-Discrimination Rules

- Sec 1557 applies to entities that receive federal financial assistance
- Often applies to multiemployer plans due to Part D drug subsidies
- A proposed rule has been under OMB review since 4/13/2018
- Expected to modify current rules relating to prohibited discrimination based on sex, including issues relating to gender dysphoria and coverage of transgender services

Current status: Proposed rule pending. Timing uncertain.

Miscellaneous other:

- HHS has extended relief for “transition” or “grandmothered” insured plans through 2020
- HHS has issued an RFI relating to selling insurance across state lines. Follows up on Executive Order. Comments due 5/6/2019.



ACA Litigation Update

- *New York v DOL* – AHP regulations
- *Texas v Azar*, global challenge to the ACA



AHP litigation: *State of New York v DOL*

- New AHP rule (June 21, 2018) expands ability of small employers and sole proprietors to group together to form a single large group health plan, avoiding the stricter rules for small group and individual market plans.
- Key changes to prior DOL guidance:
 - Geographical link is sufficient for bona fide association. Entire state or more than one state if part of a major metropolitan area.
 - Primary purpose of the association can be to provide health benefits.
 - Working owners that would not otherwise qualify as employees under ERISA can participate in an AHP.
- **Latest development:** March 28, 2019: DC District Court finds the rule an impermissible interpretation of ERISA. Core elements of rule vacated, and case remanded to DOL to determine what if anything survives under the rule's severability clause.
- **Current status:** A bit of a holding pattern. DOL/DOJ still deciding on next steps, but appeal, and a stay pending appeal, are expected. DOL statement may be found here <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/ahp-q-and-a-court-ruling.pdf>.
- **Impact:** Assuming there is a stay pending appeal, no immediate legal impact. However, the regulatory uncertainty adds a new element of risk for AHPs formed under the new rule, especially for those in process. Could slow down new AHP formation. AHPs that qualify under prior DOL guidance are not impacted.



Texas v Azar -- challenge to the entire ACA

- 2017 Tax Act (TCJA) reduced the individual mandate penalty to zero
- Texas and other states sue the federal government arguing that this makes the individual mandate unconstitutional. Rest of the ACA is not severable, so the entire ACA is unconstitutional.
- Trump Administration position -- DOJ will not defend individual mandate and argues key provisions unconstitutional (pre-ex protections, guaranteed issue, community rating, nondiscrimination based on health status).
- December 2018: District court in TX finds the entire ACA unconstitutional. Case is appealed and stay applies pending the appeal.
- **Latest development: March 2019, DOJ informs the appellate court that they agree with the district court opinion -- the entire ACA is unconstitutional.**

Current Status: No immediate legal impact as the appeals process continues due to the stay.

Intervener states and the US House arguing in defense of the ACA, as the federal government is not defending the law. May not see appeals court decision until 2020.



Legislative update



- “Surprise” Medical Bills
- Medicare for All/More
- Shoring up the ACA
- Trump Administration Principles
- Rx



Surprise Medical Billing: Developing Issue with Expected Action

- Getting serious attention on a bi-partisan basis in Congress: nearly everyone has a personal story
- Common settings likely to be addressed:
 - Out-of-network emergency services
 - Non-emergency services provided at an in-network facility by out-of-network providers
 - Other?
- Objective: Prevent patients from getting hit with unexpected and often very high medical bills
- Tough issue: Who ends up holding the bag -- how are payment disputes resolved between insurers and plans/providers/patients
 - Possible mechanisms include: preventing balance billing in some cases; capping provider reimbursements; arbitration; notifications

Current status: No legislation yet, but expected soon from a bi-partisan group of Senators, including Sen. Cassidy (R-LA) and Maggie Hassan (D-NH). Could have significant impact on self-funded plans as well as insured plans.



Next Up: Medicare for All?

- Some Democrats reach for Single-Payer
- 2020 Presidential campaign issue
- House focus for now is on protecting the ACA





Several Types of Medicare Expansion Proposals

- Single payer options
 - Medicare for All Act of 2019 by Rep. Jayapal, [H.R. 1384](#), replaces private health insurance, other than supplemental plans
 - Senator Sanders soon to re-introduce his bill
- Public plan options
 - Keeping Health Insurance Affordable Act of 2019 by Sen. Cardin, [S. 3](#), public plan option through exchanges based on Medicare
- Allowing older individuals to buy into Medicare
 - Medicare at 50 Act by Sen. Stabenow, [S. 470](#)
 - Medicare Buy-In and Health Care Stabilization Act of 2019 by Rep. Higgins, [H.R. 1346](#)

Comparison tools:

<https://www.kff.org/interactive/compare-medicare-for-all-public-plan-proposals/>

<https://www.commonwealthfund.org/many-varieties-universal-coverage>



In the meantime, preserve and protect the ACA

- House tri-Committee bill, “Protecting Pre-Existing Conditions and Making Health Care More Affordable Act of 2019”
- Introduced by Energy and Commerce Committee Chairman Frank Pallone, Jr. (D-NJ), WM Chairman Richard Neal (D-MA), and Ed and Labor Chairman Bobby Scott (D-VA)
- Key provisions:
 - Provides a reinsurance program for states, funded by an appropriation (no new funding source)
 - Expands the premium tax credit and fixes the “family glitch” under current law which bases affordability of employment based insurance for purposes of the credit on the cost for self-only coverage
 - Amends section 1332 waiver rules to adhere more to ACA requirements (aimed at Trump Administration regulations)
 - Modifies EHB rules (aimed at Trump Administration regulations)
 - Nullifies Trump Administration rules on short-term plans and AHPs
- Text of the original bill may be found at <https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Health%20Care%20Bill%20Text.pdf>
- **Current status: The separate committees are starting to mark up provisions within their jurisdiction**



Trump Administration Legislative Proposals

- In response to DOJ's new position in *Texas v Azar*, President Trump announced that new principles on health care will be released
 - Various Administration announcements on timing, soon, not until after 2020 elections, won't wait until then
 - Senate Majority Leader Mitch McConnell has stated the Senate will not take up ACA replacement legislation before 2020 elections
- President's 2020 Budget Proposal does address ACA repeal/replace
 - Calls for repeal/replace based on the Graham-Cassidy-Heller-Johnson (GCHJ) proposal from the 115th Congress, with no elaboration on possible changes
 - Also calls for significant expansion of HSAs
 - A description of the GCHJ proposal may be found here <https://www.cassidy.senate.gov/read-about-graham-cassidy-heller-johnson>
- **Current status:** Wait and see. No action on any such proposal expected in the current Congress, could be the basis for future legislation depending on outcome of 2020 elections.



QUESTIONS?