Impact of the Election on the ACA

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Objectives

We will attempt to answer the following questions:

• How easy is it to repeal or make changes to the ACA?
• What changes are possible and how could that play out?
• What do employers need to be doing now?
Important Disclaimers

Today’s presentation is speculation based on the following:

• My opinion based on experience as a lobbyist and knowledge of the ACA

• News reports about recent comments from Republicans, including President-elect Trump, Senate Leader McConnell, and House Speaker Ryan

• Previous Republican proposals, including the House Republican Health Care Reform Task Force blueprint

This is only a brief summary that reflects our current understanding of select provisions of the law, often in the absence of regulations. All of the interpretations contained herein are subject to change as the appropriate agencies publish additional guidance.

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2017 Makeup of Congress

- **House**: Republican majority

- **Senate**:
  - 51 Republican seats*
  - Need 60 to block a filibuster
    - Which means some Democrats need to be on board with proposals to make changes
  - Can use the budget reconciliation process to make changes to tax measures – only requires 51 votes

* Republicans could pick up one more seat after runoff election in Louisiana
Budget Reconciliation Process

1. Congress passes a budget that includes funding for certain proposed legislation

2. Future legislation implementing those budget provisions, called the budget reconciliation process, requires only 51 votes and is not subject to filibuster

Notes:
- In 2010 Congress used a similar process to enact the ACA
- The use of the reconciliation process is limited to budget-related measures and could not repeal or replace much of the ACA
  - Could impact provisions such as the individual and employer mandate penalties, exchange tax subsidies, and the Excise Tax on High Cost Plans (aka Cadillac tax)
Budget Reconciliation Process (cont’d)

- Senate Leader McConnell is committed to using the reconciliation process to repeal the law
- Last year Congress failed to pass a 2017 budget, so next year they could pass two budgets, for 2017 and 2018
- Tax and spending levels could assume ACA is repealed
  - Sets up the ability to pass a reconciliation bill repealing all the budgetary components of the ACA early in 2017
- Last year’s reconciliation bill, which Obama vetoed:
  - Sunset the ACA subsidies and Medicaid expansion after 2017
  - Repealed all ACA taxes, including individual and employer mandates
  - Maintained insurance market regulations
- A delayed sunset could provide time for Congress to create a replacement package
Presidential Authority

• The Executive Branch of government is authorized to enforce the law, but making laws is assigned to Congress

• Key exceptions:
  • **Executives Orders** – President-elect Trump has said he would revoke executive orders issued by President Obama
  • **Agency Rulemaking and Enforcement** –
    • Within the ACA, Congress gave several agencies broad authority to create regulations to enforce the law
    • It is possible for an agency such as the IRS to change a regulation or announce a period of non-enforcement or delay
Repeal, Replace, Amend

• Modifying the ACA is a clear priority for Republicans
• The argument for Repeal:
  • Under President Obama’s administration, the Republicans have voted 62 times to repeal the ACA
  • Many Republicans, including Trump, campaigned on the promise to repeal the ACA
• Practical reality:
  • It was easy for Republicans to vote to repeal the law when President Obama had promised to veto any such legislation
  • In effect, those votes were for political show
• Is full repeal technically possible?
  • Yes, but only with votes from at least 8-9 Democrat or Independent Senators (absent an expanded view of what’s possible through reconciliation)
Repeal, Replace, Amend (cont’d)

- Is full repeal politically possible?
  - 20 million Americans currently receive their health coverage through the Public Exchanges (Marketplaces)
  - 9 million receive tax assistance to purchase that coverage
  - Countless Americans have received coverage from ACA provisions that allow coverage for adult children, guarantee that individuals with health conditions can still buy coverage, and prohibit annual or lifetime limits on benefits
  - Republicans have criticized Obama for not letting people keep their coverage, and they could be accused of the same if they repeal without replacing the law
  - All of this makes a full repeal less politically appetizing than the votes the Republicans took under the cover of a President Obama veto
Repeal, Replace, Amend (cont’d)

• Repeal and replace, or amendment strategies:
  • Since the election, President-elect Trump and key Republican Congressional leaders are focusing on a “Repeal and Replace” strategy
  • A strategy to amend the existing law is also being discussed in order to keep certain popular provisions of the ACA

• No clear agreement:
  • Before Republicans can propose a repeal and replace strategy, they must first agree on a strategy
  • In the six years since the ACA was enacted, they have been unable to do so
  • A budget-created sunset would give them a firm deadline

• Agreement on the need to transition:
  • There does seem to be broad agreement that there needs to be some period of transition from the current law to a new one
How Long Would Repeal and Replace Take?

- Enacting the ACA
  - Took 14 months, which was really fast
  - Democrats controlled the White House, House, and Senate with a super-majority (60 votes) during most of that time
- One to two years is likely for changes
  - Most Republicans are saying it will likely take two years to enact a new law
  - Time for a transition strategy could take longer
  - Caveat: we could see regulatory changes before then through reconciliation or the regulatory process
Budget Issues

• Republicans are known for being budget hawks, which influences how they will be willing to approach certain changes

• Regulatory changes:
  • A challenge with non-enforcement of revenue-generating provisions is that many Republicans won’t want to keep the Public Exchange tax subsidies without any funding to pay for them.
  • The individual and Employer Mandate penalties provide a key part of the funding, so those may not be rolled back until the rest of the law is amended

It’s unclear whether the usual rules will apply to a Trump administration
Budget Issues (cont’d)

• Legislative changes:
  • Congress operates on a rule of paying for any legislation that it
    enacts (or repeals) so it is budget neutral
  • While there would likely be broad policy support from
    Republicans to repeal provisions such as the Employer
    Mandate or Excise Tax on High Cost Plans (Cadillac Tax), doing
    so would be expensive
  • There is not broad consensus on what should replace that lost
    revenue to the federal government
    • A frequently-proposed Republican possibility is limits on
      Internal Revenue Code section 106, which provides that
      employer-provided health and welfare benefits are not
      taxable income to employees
Power Struggle

• It’s still unclear the extent to which Republicans are going to rally behind President-elect Trump

• The far-right House Freedom Caucus has a lot of power to control the House agenda

• Republicans have a small majority in the Senate
  • They will be required to work with Democrats in order to advance their agenda.

• All of that means that we don’t yet know whether there will be more strife or synergies in trying to get things done
Democrat’s Limited but Important Power

• Remember, in order to have enough Senate votes to pass ACA-related legislation, there must be some compromise with Democrats
  • The only authority Democrats can exercise starting in 2017 is to keep Senate Republicans from enacting legislation without some provisions supported by Democrats
  • After all the negative political rhetoric against the ACA by Republicans, it’s unlikely many Senate Democrats will be willing to help Republicans achieve a win on healthcare
  • May see it as a moral obligation to protect the ACA
• After a budget bill is enacted, Democrats will have limited say in the reconciliation bills
  • It’s unclear whether Democrats would be willing and able to block passing a budget
The Only Thing We Know for Sure

The ACA is the law today and compliance is required until the law is changed

How likely is that for key ACA requirements?
IRS Reporting – Forms 1094 and 1095

• Large employers (50+ FTEs) must report information about their full-time employees, their offer of coverage, and coverage received during the calendar year
• Due to covered individuals by January 31\textsuperscript{st} each year
• Due to the IRS by February 29th, if filed on paper, or March 31\textsuperscript{st} if filed electronically
Do Employers Have to Keep Working on their 2016 1095-B and 1095-C filings?

• Practically speaking, yes
• Fastest path to eliminate the requirement: IRS notice of non-enforcement
Timeline

- **Friday, January 20** – Inauguration
- **Monday, January 23** – Likely first day that President Trump could have his new agencies announce periods of non-enforcement, etc.
- **Tuesday, January 31** – Last day for employers to mail 1095-C Forms to employees
- Bottom Line: there is too much work to do to complete the Forms 1095-C by January 31 if employers do not start until January 23
- Practical Effect: need to keep doing the work now under the assumption that the reports will still be required
- P.S. This issue didn’t make Trump’s list for his first week
Employer Mandate

• The Employer Mandate requires large employers to offer adequate and affordable coverage to full-time employees or potentially pay a penalty

• It would likely require legislation from Congress to make significant changes to this provision

• For now, employers should continue complying with the law that’s in effect today
Likely to Stay

- Support for employer-sponsored health coverage system
- Ability to cover adult children to age 26
- Ban on annual and lifetime dollar limits on coverage
- Guaranteed ability to buy coverage, even if you previously had a health condition
  - May include a provision to require “continuous” coverage

While the provisions above have been specifically cited as likely to be retained by Republicans, it’s possible they retain almost all of the plan design mandates from the ACA
Likely to Not Be Implemented

• It’s likely that the Trump administration will not create new regulations enacting any ACA provisions that were not implemented under the Obama administration

• For example:
  • Non-discrimination by insured plans against highly compensated individuals
  • Quality reporting
  • Transparency disclosures
Likely to Change

- Individual and Employer Mandates
- Employer reporting
- Excise Tax on High Cost Plans (Cadillac Tax)
- Tax increases on high-income individuals
- Tax on health insurers
- Limits on what insurers can charge older individuals
- Tax subsidies to buy coverage through the Public Exchanges
- Medicaid funding
- Medicare changes
Outlook Unclear

- Employer wellness programs
  - Republicans have proposed making it easier to reward employees for healthy choices
  - It’s unclear how that would change the ACA wellness rules, which are already fairly easy for employers to utilize

- Mandate to cover contraceptives as preventive care

- Public Exchanges
  - Republicans typically prefer competition in the individual market to a government-sponsored program
  - Unclear how to transition away from a program covering 20 million people
New Proposals

• Encourage use of Health Savings Accounts
• Make it easier for the FDA to approve new drugs
• Ability to purchase health insurance across state lines
• Allow individuals and small employers to band together to purchase coverage through pools
• Enact medical liability reform
What Should Employers be Doing Now?

• Continue complying with the law as we know it today
• Continue work on the 2016 Form 1095-B and 1095-C reporting
  • Data is often an issue
  • Time to start gathering coverage information
• Continue exploring and implementing strategies to help reduce health plan costs
• Make sure you have a resource for keeping up with developments in the changing law
  • American Fidelity is committed to keeping you informed as the law continues to develop
  • Sign up for complimentary email updates at HCReducation.com
Bottom line

• The ACA is still the law today

• It’s harder to change key provisions than it may first appear
  • Senate seems committed to using budget reconciliation process, which could at least impact key tax provisions

• Republicans do not yet have agreement on what the “replace” part of their strategy should include

• Wild cards:
  • Power struggle between Congress and the White House
  • Willingness of Senate Democrats to support ACA legislation

• American Fidelity is committed to keeping you informed and helping you with your compliance efforts
Thank you!

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