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New Executive Order and Insight on the Employer Mandate

Gauri Gupta | Insure Your Company.com | (888) 242-4675 x.x2008 | gauri@insureyourcompany.com

President Trump signed an Executive Order (“EO”) on October 12, 2017, directing various federal agencies to take regulatory action that will “increase health care choices for millions of Americans.”

Along with the EO, the Administration issued a press release and some internal talking points that provide helpful insight into what the agencies are directed to review.

As it affects employer-sponsored plans:

- The Department of Labor (“DOL”) is directed to consider expanding access to Association Health Plans (“AHPs”) which could allow employers to form groups across state lines. Specifically, by taking a broader interpretation of ERISA, employers in the same line of business anywhere in the country could join together to offer healthcare coverage to their employees through the large group insurance market or through self-insurance, potentially accessing more coverage options at a lower cost. Such arrangements could be formed for the “express purpose” of offering group insurance (under current regulations, the sole purpose of any association plan cannot be the purchase of group insurance).
 - Within 60 days, the DOL shall consider proposing regulations or revising guidance consistent with the law, to expand access to health coverage by allowing more employers to form AHPs. The EO directs the agency to consider expanding the conditions that satisfy the “commonality-of-interest” requirements under the existing definition of an “employer” under ERISA 3(5).
 - The EO continues to support popular ACA mandates, including offering coverage to children to age 26, no annual or lifetime dollar limits, no cost-sharing for certain preventive care, and a general prohibition on preexisting condition exclusions and health status rating.

- The EO specifically references using self-insurance as an option of AHPs. Because the current federal law permits association coverage to be governed under both state and federal rules, the EO raises issues in those states that either (1) prohibit creation of new self-insured association plans or (2) heavily regulate the ability to use self-insurance as an option under multiple employer welfare arrangement (“MEWA”) rules.
- The Departments of the Treasury, Labor, and Health and Human Services (“the Departments”) are to, within 60 days of the EO, consider proposing rules to expand coverage through low-cost short-term limited duration insurance (“STLDI”). It appears this coverage would be available in the individual market, primarily targeting individuals who are between jobs (as a lower cost alternative to COBRA), individuals in counties with only a single carrier option in the Marketplace, people with limited networks and those who missed annual Marketplace open enrollment but still want to purchase coverage. STLDI would not be subject to many of the insurance mandates under the ACA but would feature broad provider networks and high coverage limits.
- Within 120 days of the EO, the Departments are to consider additional changes that support more flexibility and increased usability of Health Reimbursement Arrangements (“HRAs”), including use with nongroup health insurance coverage.

What’s Next?

An EO is a statement issued by the President to the federal agencies directing priorities and action on specific matters. Such policies generally do not have the effect of creating a new law or regulations.

The agencies will review the EO in context with the existing statutory and regulatory framework to determine how they can enact regulations or issue other guidance within the constraints of existing law. The Departments are likely to initially issue proposed regulations as the starting point for addressing the goals of the EO. However, the regulatory process is slow and its unlikely any final rules will be issued before 2018.

Specifically, with respect to AHPs, these arrangements are unique under ERISA as there is joint federal and state authority for governance. Creating a more flexible AHP marketplace, including crossing state lines, will bump up against various state insurance laws that may prohibit these types of transactions. Many states’ insurance commissions and state governments have already announced their intent to challenge any federal overreach into a long-established tradition of state regulation of the insurance market.

In Other News: The Individual and Employer Mandates

The talking points contain a number of Q&As. Notably, when asked whether the Administration intends to enforce the Individual and Employer Mandate, the Administration responded as follows:

“The administration believes Congress should repeal the individual and employer mandates, and respective penalties enforced by the IRS on people who fail to purchase Washington-approved coverage and employers with at least 50 workers that fail to offer Washington-approved coverage. While HHS has the ability to define a hardship exception for the purpose of the individual mandate, the tax penalties are contained in the Internal Revenue Code and only Congress can change the law.”

Therefore, it is notable to employers that, absent Congressional action, the Trump administration appears (at least based on these informal statements) willing to enforce the Employer Mandate.

Employer Action

Employers should:

- Be aware that we are likely to see new regulations addressing AHPs, HRAs, and STLDIs in the coming months. While changes to existing AHP and HRA rules are unlikely to affect 2018 plan years, such guidance may create challenges for 2019 and beyond.
- As the Administration signaled its intent to enforce the Employer Mandate:
 - Plan for compliance with the 2017 ACA reporting. The final Form 1094-C, Form 1095-C and Instructions are available.
 - Prepare to address any notices issued by the IRS regarding Employer Mandate assessments for the 2015 and 2016 calendar year.