

On First Day, President Trump Issues Executive Order on ACA

Just hours after being sworn in to office, President Trump signed an Executive Order officially setting out the policy of his Administration to seek repeal of the Affordable Care Act (ACA). For however long the law remains in effect, the Executive Order asserts it is "imperative for the executive branch to ensure that the law is being efficiently implemented, take all actions consistent with law to minimize the unwarranted the economic and regulatory burdens of [ACA], and prepare to afford the States more flexibility and control to create a more free and open healthcare market." But what does it really mean?

The best starting point is the language of the Executive Order itself, key parts of which are reproduced below:

Sec. 2. To the maximum extent permitted by law, the Secretary of Health and Human Services (Secretary) and the heads of all other executive departments and agencies (agencies) with authorities and responsibilities under the Act shall exercise all authority and discretion available to them to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the Act that would impose a fiscal burden on any State or a cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products, or medications.

Sec. 3. To the maximum extent permitted by law, the Secretary and the heads of all other executive departments and agencies with authorities and responsibilities under the Act, shall exercise all authority and discretion available to them to provide greater flexibility to States and cooperate with them in implementing healthcare programs.

Sec. 4. To the maximum extent permitted by law, the head of each department or agency with responsibilities relating to healthcare or health insurance shall encourage the development of a free and open market in interstate commerce for the offering of healthcare services and health insurance, with the goal of achieving and preserving maximum options for patients and consumers.

Sec. 5. To the extent that carrying out the directives in this order would require revision of regulations issued through notice-and-comment rulemaking, the heads of agencies shall comply with the Administrative Procedure Act and other applicable statutes in considering or promulgating such regulatory revisions.

Clearly, the Executive Order challenges incoming Secretaries of Health and Human Services (Tom Price), Labor (Andrew F. Puzder), and Treasury (Steven Mnuchin) to look for ways to ease the "burdens" of ACA on key stakeholders, presumably including employers (although not mentioned by name). But so far none of these nominees

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have been confirmed by the Senate. Until they are, they cannot take any official action on the Executive Order.

Once confirmed, how quickly they will be able to take action on the Executive Order will depend on what steps they decide to take. For example, some reports indicate priorities will include loosening up the rules relating to "essential health benefits" and individual mandate hardship waivers. Changing the rules for "essential health benefits" almost certainly would require issuing new proposed regulations, followed by a review and comment period, and then final regulations. Typically that process takes a year or more even for noncontroversial items.

By comparison, it may not require formal rulemaking to more liberally interpret the standards for granting hardship exemptions. But there are practical considerations as well. An effective individual mandate is essential to the continued functioning of the health insurance exchanges under current law.

To date, no specific mention has been made of how the Executive Order is expected to impact the provisions most directly affecting employers – e.g., the Employer Shared Responsibility Rules and related employer reporting requirements. So until something official is announced by the Treasury Department, employers (and all other stakeholders) should continue to comply with existing rules. That includes preparing to furnish a 2016 1095-C to employees by March 2, 2017, and file with the IRS by March 31, 2017.

For more information on the Affordable Care Act and updates, visit the [Deloitte ACA website](#).