FOLEY HOAG LLP

Labor and Employment Alert

President Signs EO Loosening Health Care Regulations

Written by Thomas Barker, Christopher Feudo, Ross Margulies, Christian Springer

October 13, 2017

On October 12, 2017, President Trump signed an Executive Order (EO) entitled "Promoting Healthcare Choice and Competition Across the United States." The much-anticipated EO directs the Departments of Treasury, Labor, and Health and Human Services to work on drafting rules and guidance to loosen regulations on insurance and to change the way in which individuals and employers purchase insurance in order to achieve three primary objectives:

- Expand access to "Association Health Plans" ("AHPs")
- Expand availability of short-term limited duration insurance ("STLDI")
- Expand availability and permitted use of Health Reimbursement Accounts ("HRAs")

According to the EO, the Administration will also focus on promoting competition in healthcare markets and limiting "excessive consolidation" throughout the healthcare system. Further, the EO states that the healthcare system should improve access to and quality of information, including data about healthcare prices and outcomes, while also reducing burdens on plans, providers, and payers.

The three federal agencies tasked with implementing the President's EO must consider proposing regulations (through notice and comment) or revising guidance, as described further below.

Association Health Plans

Within 60 days, the EO directs the Secretary of Labor to consider how to expand AHPs. Under current law, AHPs refer to an insurance plan wherein an association provides health benefits to its members who share a "commonality of interest." Importantly, AHPs are generally subject to the same federal and state insurance standards as small-group market plans. This means that they must comply with, among other things, the Affordable Care Act's ("ACA") pre-existing condition prohibition and with the law's essential health benefit (EHB) requirements. Large-group health plans are not subject to these requirements.

The EO identifies two specific mechanisms that the Secretary of Labor should investigate in order to expand access to AHPs. The first involves expanding the conditions that satisfy the commonality-of-interest requirements. Expanding the conditions to satisfy when employers are considered to share a "common interest" would make it easier for employers to demonstrate eligibility to participate in an AHP.

The second involves adopting a broader interpretation of the definition of "employer" under the Employment Retirement Security Income Act ("ERISA"). By redefining the definition of "employer," the Secretary of Labor could potentially enable a much broader class of organizations, and in the most extreme case, individuals, to enter into AHPs. Furthermore, the Center for Medicare & Medicaid Services ("CMS") could also change its longstanding position that AHPs are generally subject to the small-group market insurance requirements by classifying AHPs as "large-group market plans," which would exempt these plans from many of the ACA's coverage requirements.

Short-term Limited Duration Insurance

The EO also directs the Departments of Treasury, Labor, and Health and Human Services to, within 60 days, develop ways to encourage coverage through STLDI policies. STLDI policies offer limited benefits for a limited amount of time and are intended primarily for individuals between jobs or young adults no longer eligible for coverage under their parents' policy. STLDI policies typically cost a fraction of what major medical insurance policies cost because they do not offer as robust of a benefit package as major medical policies (nor are they required to offer such benefits under the ACA). Importantly, in late 2016 the Obama Administration limited STLDI policies to no more than 90 days out of a concern that individuals would use them as a substitute for long-term major medical coverage (which is generally subject to coverage protections under the ACA).

The EO directs the Secretaries of Treasury, Labor, and Health and Human Services to "expand the availability of STLDI." In particular, the EO states that the Secretaries should consider allowing STLDI to extend beyond the 90-day limit imposed by the Obama Administration, and to allow STLDIs to be renewed by the consumer. This would effectively allow consumers to forego major medical insurance and instead enroll in cheaper STLDI policies. STLDI policies do not count as "minimum essential coverage" for the purposes of the individual mandate, but the Trump Administration has made clear it does not intend to enforce the mandate.

Health Reimbursement Accounts

The EO instructs the Secretaries to "increase the usability of HRAs, to expand employers' ability to offer HRAs to their employees, and to allow HRAs to be used in conjunction with nongroup coverage" within 120 days. Unlike the previous two objectives, the EO does not identify any specific mechanisms to achieve increased "usability of HRAs." However, some possible changes could include increasing the contribution limits of HRAs, and allowing individuals to use HRA funds to purchase insurance (as opposed to solely covering out-of-pocket costs associated with an existing insurance policy).

Additionally, with 180 days and every two years, the Secretaries must report to the President on state and federal laws, regulations and guidance that do not conform to the policies described in the EO and must identify actions that states or the federal government could take in furtherance of the EO's policies.

Looking Ahead

Of the EO's three major directives, the expansion of AHPs would be the most far-reaching. A reinterpretation of ERISA that would enable employers across the country and of all sizes to potentially band together to form AHPs would involve significant revisions to agency precedent and push the boundaries of the agency's interpretive authority under the statute.

That said, the Trump Administration's stated direction could significantly enhance the bargaining power of employers. Importantly, it could enable a greater number of employers to bypass the ACA's coverage requirements, which includes, for example, the requirement that plans include prescription drug coverage as an essential health benefit. In light of the rising costs of healthcare, and of prescription drugs more specifically, employers may find that the costs associated with their health benefits are more sustainable if they reduce the comprehensiveness of benefits below what the ACA requires, or in extreme cases, drop some benefit categories all together.

As President Trump's EO begins to take form in the coming months through agency rulemaking and sub-regulatory guidance, employers and other stakeholders should remain engaged every step of the way to ensure that their interests are represented in what will likely be a very active regulatory agenda.

RELATED INDUSTRIES

- Healthcare

RELATED PRACTICES

- Labor & Employment
