Aflac. Federal Relations Advisory

President signs executive order directing agencies to review and modify Affordable Care Act (ACA) regulations in key areas

By: Carolyn Smith and John Hickman, Alston & Bird LLP

New Administration Action

President Trump signed an Executive Order on Oct. 12, 2017, directing federal regulatory agencies to review and modify regulations with the objective of increasing competition in health care markets, increasing consumer choices and lowering costs for health care. The executive order prioritizes three specific areas: making association health plans (AHPs) available to more employers, allowing employers to make better use of health reimbursement arrangements (HRAs) and expanding coverage through short-term limited duration insurance (STLDI). The president's executive order is just the beginning of the process. It tasks three federal agencies, the departments of Labor (DOL), Treasury, and Health and Human Services (HHS) (together, the tri-agencies) with reviewing current rules and developing guidance to implement the executive order. Thus, the details of any changes will not be known until the agencies act.

The proposed changes will be welcome news for some. However, certain aspects of the executive order are also controversial. Some commentators have raised concerns that, although premium costs may be reduced for some, the relaxation of rules could result in inferior coverage that would undermine the protections the ACA imposed on major medical plans.

The executive order should have no direct effect on Aflac supplemental products, including accident, disability, hospital indemnity and other fixed indemnity coverage, and specified disease or illness coverage. These products are not designed as primary medical coverage or as a substitute for major medical coverage, but rather recognize that when an injury or illness occurs, families may face many financial needs that major medical insurance does not cover. Such products have been recognized in federal law for decades as "excepted benefits" and, as such, are exempt from the insurance market mandates imposed on major medical coverage by the ACA.

Expand Access to Association Health Plans (AHPs)

Currently, AHPs are designed to provide a means for small businesses to join together at an association level and pool their risk for health coverage purposes. Often, AHPs are organized around a professional or industry group and they offer efficiencies of scale, such as reduced administrative expenses. These plans are regulated by the DOL under the Employee Retirement Income Security Act (ERISA). They are also subject to regulation under state insurance laws. The level of applicable state regulation may vary based on whether the AHP is fully insured or self-funded.

If DOL requirements are met, then the AHP is considered a single, typically, large group health plan. In such a case, the AHP does not have to comply with the ACA rules that apply only in the small group market (such as the requirement to offer essential health benefits), which would allow greater flexibility in plan design and may reduce costs. On the other hand, if the AHP does not meet DOL requirements, then each employer in the association is considered to be sponsoring its own health plan, which means that the more restrictive rules for ACA small group plans generally would apply.

The executive order directs the DOL to consider proposing regulations or revising guidance within 60 days to expand access to health coverage by allowing more employers to form AHPs, including expanding the conditions under which a group health plan will be found to exist at the association level based on the commonality of interest of the employers. The DOL is also directed to consider ways to promote the formation of AHPs on the basis of common geography or industry.

What to expect: The liberalization of AHP health plan rules should allow more employers to band together and purchase coverage as if they were a single large group. The criteria for employer participation, the extent of state regulation that will apply, and the extent to which any expansion will apply to self-funded as well as insured groups remains to be seen.

Expanded Use of Health Reimbursement Arrangements (HRAs)

Currently, the ACA prohibits employers from paying for major medical coverage issued in the individual market on a pretax basis for their employees and/or maintaining a stand-alone defined contribution medical reimbursement plan, such as an HRA. There are some exceptions to this general prohibition. For example, retiree-only coverage and certain excepted benefit coverage are not impacted by this guidance because such coverage is exempt from the ACA insurance mandates. Additionally, small employers with generally fewer than 50 full-time employees or their equivalents and who are not subject to the ACA employer penalties, may pay for individual market insurance on a pretax basis through Qualified Small Employer Health Reimbursement Arrangements (QSEHRAs). The IRS has not issued any guidance on QSEHRAs, which means it is not clear exactly how it will be implemented.

The executive order directs the tri-agencies to consider proposing new regulations or revising existing guidance related to HRAs within 120 days in order to increase the usability of HRAs, expand employers' ability to offer HRAs to their employees and allow HRAs to be used in connection with nongroup (i.e., individual market) coverage.

What to expect: The executive order signals both the potential for employers to have stand-alone HRAs for their active employees and a possible relaxation of the restrictions on large employers paying for individual market insurance on a pretax basis. Among the many issues to be addressed will be how any new guidance relates to QSEHRAs and coordinates HRAs with existing ACA rules (such as the creditable coverage and premium tax subsidy rules).

Short-term Limited Duration Insurance (STLDI)

Currently, STDLI is exempt from the insurance market mandates of the ACA if it has a coverage period of less than three months. Because of the three-month limitation on coverage, such insurance currently serves as temporary stop-gap insurance. The three-month coverage restriction is a new development due to final guidance issued in October 2016. Until that change was made, short-term limited duration insurance could have a coverage period of less than 12 months and be exempt from the ACA market reforms.

The executive order directs the tri-agencies to consider, within 60 days, proposing regulations or revising existing guidance to expand the availability of STLDI, including, to the extent permitted by law and supported by sound policy, allowing such insurance to cover longer periods and be renewed by the consumer.

What to expect: Depending on the permitted term and renewal periods, the result could be at least going back to a coverage period of up to 12 months and potentially longer-term coverage that is exempt from the ACA market requirements (e.g., modified community rating, requirement to cover essential health benefits and limits on out-of-pocket expenses).

Conclusion

The president's executive order provides the basis for potentially significant changes in regulations relating to AHPs, HRAs and STLDI. Until agency guidance is issued, the full extent of the changes and their impact on the individual and small group markets will not be known. While some will welcome the changes and increased flexibility, others will have concerns and a number of the agency actions may provoke controversy. As excepted benefits, Aflac supplemental policies are regulated at the state level and exempt from the ACA insurance requirements. The executive order should have no direct impact on such products.

WWHQ | 1932 Wynnton Road | Columbus, GA 31999

Z181459 EXP 12/19