

# Health Law Alert: Has Obamacare been Trumped? The Potential Impact of the New Administration on the Affordable Care Act

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Throughout his campaign Donald Trump repeatedly said he would "repeal and replace" the Patient Protection and Affordable Care Act (ACA, aka "Obamacare"). With Republican majorities in the Senate and House, he appears to have Congress on his side. But important questions remain: Can the ACA actually be repealed? What will happen to the current health insurance system and the millions of Americans that rely on it? And while issues like the ACA's "individual mandate," Medicaid expansion, and the existence of the internet-based health insurance marketplaces (the "exchanges") hold the media spotlight, health care providers are left wondering whether the shift to value- and performance-based reimbursement ushered in by the ACA will stay in place.

Although the new administration does have the ability to dramatically alter the current system and repeal significant ACA provisions, a complete repeal is unlikely. Meanwhile, as the nascent administration begins to take shape, Trump's nominations for Secretary of the Department of Health and Human Services (HHS) and the Director of the Centers for Medicare and Medicaid Services (CMS) shed some light on strategies that are likely to be followed by the ACA's opponents.

## **The Affordable Care Act**

A hugely complex law, the ACA has touched nearly every aspect of the U.S. health care industry. Among other things, it established health insurance marketplaces, required individuals to obtain health insurance or face a tax penalty (the "individual mandate"), increased the government's ability to combat health care fraud and abuse, expanded coverage and eligibility under Medicaid, and prevented insurance companies from denying coverage or increasing costs due to pre-existing conditions.

The ACA has been subject to constant challenge since it was first passed in March 2010. Congressional Republicans have voted over sixty times to repeal the law and many governors have fought against its implementation in their states. Controversy in recent years has been fueled by an increase in health insurance premiums for plans sold on the ACA's exchanges. In Minnesota, for example, individuals have



seen a 59 percent increase in premium rates for plans sold on MNSure. Opponents also note that many counties (particularly in rural areas) have seen health plans withdraw from the market, leaving many marketplace consumers with only one plan option. Supporters of the ACA, however, note the law's success in dramatically reducing the uninsured rate. Approximately 20 million people obtained insurance due to the ACA and the U.S. uninsured rate dropped to 8.6 percent this year, the lowest on record. Supporters also point to the law's success in bending the health care cost curve downwards.

### **Can the ACA be Repealed?**

Despite Trump's promise to dismantle the ACA, his ability to achieve a full repeal will be challenging. To repeal the ACA in its entirety and replace it with new legislation, Republicans would have to secure 60 votes to overcome a Democratic filibuster in the Senate. Even with a Republican majority in the Senate, experts believe securing 60 votes (which would require eight Democratic votes) will be very hard, if not impossible, to accomplish.

Alternatively, Republicans could pick apart the law through a legislative process known as "budget reconciliation." This permits the Senate to pass certain revenue and spending measures with only a simple majority (i.e., 51 votes). Through this method, Republicans could repeal key ACA financial aspects, such as the individual mandate, the employer mandate, the so-called "Cadillac tax," Medicaid expansion, and even the marketplace subsidies that make health care affordable for low-income individuals. However, other important parts of the ACA are not subject to budget reconciliation, such as the prohibition on insurance companies using pre-existing condition limitations. Repeal of this and related provisions would require 60 votes in the Senate.

Finally, the new administration could impede many aspects of the ACA simply through adopting enforcement priorities that ignore ACA objectives. For example, the new administration could halt the Obama administration's efforts to market the availability of health insurance sold on the exchanges, or cease defending the ACA in controversial lawsuits (including the *Zubik v. Burwell* case on contraceptive coverage). While this approach is less dramatic than a full repeal, it would thwart the ACA nonetheless.

### **Key ACA Issues for the New Administration**

Due to the challenges with a full repeal, Congress is likely to only repeal certain parts of the law. There is significant debate about whether they will introduce replacement legislation to fill in the gaps or whether they will permit a hollowed-out version of the ACA to remain on the books. Either way, the following will be high priority issues:



## **Implications of HHS and CMS Leadership on ACA and MACRA Reforms**

Trump's choice to head HHS, Representative Tom Price, R-Ga., is a longstanding opponent of the ACA. Rep. Price has also been critical at times of Medicare's shift to a value- and quality-based reimbursement model. For example, Rep. Price has publicly opposed Medicare's Comprehensive Care for Joint Replacement reimbursement model, Medicare's cardiac bundled payment model, and the very existence of the Center for Medicare and Medicaid Innovation (an ACA reform that created a sub-agency within CMS that is tasked with designing, testing, and implementing care delivery and reimbursement reforms). Rep. Price has been particularly critical of CMS' mandatory demonstration projects. And while Rep. Price voted in favor of 2015's Medicare Access and Chip Reauthorization Act (MACRA), which repealed the Part B sustainable growth rate and implemented the merit-based incentive payment system for physician services, he remains critical of the law.

Following the release of MACRA final regulations in October, Rep. Price stated he is "deeply concerned about how this rule could affect the patient-doctor relationship." For providers who have spent countless hours and huge amounts of money planning and adopting care delivery models that conform to CMS' quality- and value-based reimbursement, the new leadership at HHS and CMS raise questions about the direction in which the Medicare program is headed.

With respect to other types of Medicare reform, House Republicans have proposed to create a premium support program under which Medicare beneficiaries make an income-adjusted payment toward their plan of choice, with Medicare subsidizing the cost. The goal is to expand participation in Medicare managed care and shift away from traditional Medicare. Rep. Price has also supported turning Medicare into a premium support system as well as proposals to expand the ability of physicians to "opt out" of Medicare and enter into private contracts with Medicare beneficiaries.

### **Can we keep the ACA's "good parts" and ditch its "bad parts"?**

Although many ACA provisions are controversial, some aspects are widely accepted. For example, the ACA reform that permits young adults to stay on their parent's health insurance plan until they are 26 years old has proved popular. Donald Trump himself has expressed support for this and several other important ACA insurance reforms. The new administration may prefer to keep the "good" aspects of the ACA, such as this expanded coverage for young adults, but ditch the "bad" aspects, such as the individual and employer mandates. While this may sound appealing to the new administration, many industry observers point out that the insurance reform provisions were premised on health plans being able to spread risk among a much larger population base (through the implementation of the individual mandate). Forcing insurers to continue offering enhanced benefits under their health plans without the ability to control costs through an expanded pool of consumers is untenable.



## **Insurance Exchanges and Subsidies**

It is unclear whether Trump will attempt to eliminate insurance exchanges and subsidies. Trump has indicated he would allow individuals to fully deduct health insurance premium payments from their tax returns and make contributions into health savings accounts (HSAs) tax-free, with the ability to pass HSAs on to heirs without estate tax.

The House Republicans would, however, support a repeal of the insurance exchanges (as indicated in the "A Better Way" platform). Because Trump and Congress would work together on health care reform, a repeal of the exchanges is a possibility. House Republicans also support providing a tax credit in the form of a monthly payment to use toward purchasing insurance coverage.

## **Medicaid Reforms**

Medicaid expansion is a key aspect of the ACA. By increasing the income levels through which individuals qualify for coverage, states can provide coverage for a greater number of its residents. Trump has indicated he will turn Medicaid into a block-grant program, giving states an annual lump sum payment that can be used towards their Medicaid programs. Rep. Price has also supported this approach. The House Republicans' plan is similar. There would be two options for Medicaid funding: (1) block-grant funding, similar to Trump's plan; or (2) a per-capita payment that is determined according to four eligibility categories (aged, blind and disabled, children, and adults).

## **Provider Fraud and Abuse and Program Integrity**

The fraud and abuse portions of the ACA were passed with bipartisan support and are unlikely to change. The government's efforts have been very successful; for every dollar spent on combating health care fraud and abuse, the federal government (via the Department of Justice and HHS) recovers \$6.10. This commitment to reducing fraud, waste, and abuse will likely continue with the new administration.

Ultimately, dismantling the ACA and developing a workable alternative may take years, setting this up to be an issue for the 2020 presidential election. With millions of Americans at risk for losing coverage, Trump may be less willing to pull the plug on significant Obamacare provisions as time goes on.

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