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The American Rescue Plan Act of 2021: A New Lease on Life for the Affordable Care Act?

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On March 10, 2021, President Biden signed into law the American Rescue Plan Act of 2021 (the “Act”). This $1.9 trillion COVID-19 relief package not only includes a whole host of healthcare-related provisions, but, along with actions taken (or not taken) by the Biden Administration, accounts for a marked departure from healthcare policy carried out by the Trump Administration. No difference is more striking than the Administration’s treatment of the Affordable Care Act (“ACA”). While President Trump spent much of his four years in office targeting and undermining the ACA, in these early days of his administration, President Biden not only has halted the barrage of attacks, he also has carried out several bolstering moves to the law. This article outlines the most significant of these moves by President Biden and his allies in Congress.

California v. Texas

As we’ve discussed in prior Healthcare Law Blog posts, challengers to the ACA in *California v. Texasescue Plan Act of 20* have asserted that, with the individual mandate reduced to $0 through the Tax Cuts and Jobs Act of 2017, the mandate should no longer be considered a tax that Congress can enforce. Moreover, these challengers have argued that the mandate itself is inseverable from the ACA, such that the whole law should be struck down. While the federal government under the Trump Administration supported the arguments presented by the challengers, not surprisingly, the Biden Administration has reversed course.

In a February 10, 2021 letter to the U.S. Supreme Court, Deputy Solicitor General Edwin Kneedler wrote that “the Department of Justice has reconsidered the government’s position” and “no longer adheres to the conclusions in” the brief filed by the Trump Administration in February 2020. In short, Kneedler’s letter stands for the proposition that the Biden Administration believes that the individual mandate is constitutional, notwithstanding the fact that Congress and the prior administration reduced the penalty under the ACA’s individual mandate to zero.

While this is a dramatic change from the Trump Administration's position, the public move may not have a large impact on the case, which was heard over four months ago and could be decided at any point. As we have previously observed, there is a reasonable chance that the individual mandate will be struck down as unconstitutional. However, despite the conservative majority on the Supreme Court, it seems the ACA has a chance of surviving this blow, with conservatives Chief Justice Roberts and Justice Kavanaugh suggesting in oral argument they thought the mandate could be severed from the rest of the law. If the Court indeed rules in this fashion, the Biden Administration likely would be pleased with the result, as the core of the law would survive, giving the Administration a second chance to continue to strengthen the ACA as it stands, rather than push to implement a replacement law that would be more difficult to pass through Congress.

ACA Special Enrollment Period

In a January 28, 2021 Executive Order ("EO"), President Biden announced the implementation of a special enrollment period which lasts from to February 15, 2021 to May 15, 2021, and provides uninsured and under-insured Americans with another chance to seek coverage under the ACA federally facilitated insurance marketplace (the "Marketplace" or "Exchange"). As described in the announcement, the special enrollment period reflects the exceptional circumstances created by the COVID-19 pandemic and the resulting need to give individuals and families another chance to enroll on the Exchanges – especially after the prior administration shortened the 2020 enrollment period.

As part of the same order, President Biden also ordered all heads of other executive departments and agencies with authorities and responsibilities related to Medicaid and the ACA to review all agency regulations, orders, policies etc. to determine whether such agency actions are inconsistent with the Biden Administration's goal to strengthen Medicaid and the ACA, and to "make high-quality healthcare accessible and affordable for every American." The Executive Order also encourages the heads of such agencies to revise such policies as necessary, and take consider whether additional agency actions need to be taken to support such a stance.

Marketing Funds

Biden's push for a special enrollment period and his focus on ACA access also requires the availability of sufficient funds to promote such access – and luckily enough for him, he has inherited just that. Insurers participating on the Exchanges typically must pay user fees, which are then used to finance certain expenses, including marketing.

Over the last few years, the Trump Administration substantially reduced advertising expenses, as well as cut funding on certain outreach programs, leading to a significant surplus in user fee revenue collected. As just one example, ACA navigator funding was cut from Obama's initial grant of $108 million to $10 million – a more than 90% drop.[1] Because of this cut, including cuts to other marketplace programs, more than $1 billion in unspent federal user fee revenue was accumulated between 2018 and 2020.[2] These accumulated user fee surpluses are now available to be used for purposes of publicity and outreach to consumers. Although the Act does not include any increased allocations to such activities, the future may see the Biden Administration dedicating increased resources to ACA-related marketing activities.

American Rescue Plan Act of 2021 – Subsidies on Subsidies

The Act has several important measures which support President Biden's push for increased healthcare access and affordability, with subsidies, expansion of eligibility and additional opportunities for individuals to obtain coverage, as outlined below.

1. **Expanded Marketplace Premium Subsidies**

The Act provides for premium subsidies for the 2021 and 2022 calendar years. It completely subsidizes health insurance premiums for individuals who earn up to 150% of the federal poverty level for the second cheapest silver plan by area – a change from before where individuals up to 150% were only partially subsidized, paying up to 4.14% of their household incomes. Premium tax credits also apply and provide considerable changes in premium contributions by higher earners. For example, individuals making 400% of the federal poverty level previously paid up to $5,017. Under the Act, such individuals will max out at $4,338 for premiums. Individuals who earn more than 400% above the federal poverty levels will also receive premium subsidies, such that they will pay no more than 8.5% of their annual incomes for their marketplace health insurance premiums in total. These subsidies are retroactive, and thus may be claimed by individuals who have already enrolled. Enrollees also have the option of claiming such subsidies as 2021 tax refunds.

Certain individuals filing for and receiving unemployment insurance benefits will also be able to take advantage of marketplace subsidies, including certain zero-premium plans through cost sharing subsidies in the 2021 year. Moreover, in 2021 individuals receiving unemployment insurance benefits will qualify as applicable taxpayers, a requirement for marketplace subsidies.

Lastly, while typically individuals must repay any excess premium tax credits if their annual income exceeds 400% of the federal poverty level, the Act waives this repayment requirement for 2020.[3]

2. **Consolidated Omnibus Budget Reconciliation Act (COBRA) Subsidies**

The Act also completely covers COBRA premiums for 6 months, starting April 1, 2021, for unemployed individuals who have been laid off or are contending with reduced hours, and are not eligible to enroll in certain other plans. COBRA premiums will be paid by former employers during this period, who will then be reimbursed by the federal government. Eligible individuals will also have an extended time period from their qualifying event to elect COBRA. [4]

3. **Marketplace Modernization**

The Act allocates $20 million in funding to state-based marketplaces as a means to provide financial support for the implementation of the marketplace changes needed to comply with the Act. Such funding for “marketplace modernization” is available through September 2022.[5]

4. **Medicaid Expansion**

Finally, the Act attempts to incentivize the 12 remaining Medicaid non-expansion states to expand Medicaid to provide coverage for low-income adults by increasing the federal match that these states would receive if they so expand their respective Medicaid programs. While the federal government covers 90% of coverage costs for eligible Medicaid expansion populations, any of the eligible non-expansion states that increase their programs would additionally temporarily receive a coverage of 5 percentage points for non-expansion populations for a period of 2 years.[6]

Looking Forward

The first 100 days of the Biden Administration has ushered in a change in many of the previous administration's healthcare policies. If the Supreme Court ends up severing the individual mandate and upholding the rest of the ACA, as many experts expect, the Biden Administration has an opportunity to continue to build on its promises to expand access and affordability of healthcare through both the ACA and Medicaid. Since 2018, insurers have been increasingly entering or expanding their service areas in the ACA marketplaces. With the bolstering of the ACA, and specifically the improved access to the marketplace, this trend is likely to continue and reach back to its peak in 2016.[7] Moreover, with access to additional funds for marketing the Exchange and an extended enrollment period, we are likely to see healthcare enrollment through the Marketplace expand as more individuals access available plans. These enrollment numbers will be made even stronger as job losses from the pandemic lead a greater number of individuals to seek insurance previously obtained through employers, elsewhere. The Congressional Budget Office has estimated the Act will result in extra coverage to about 800,000 uninsured individuals in 2021, 1.3 million in 2022 and 400,000 in 2023.[8]

It remains to be seen, however, how slow the implementation period and climb in numbers are, as governmental agencies begin to implement the vast changes announced through the Act. While the Department of Health and Human Services has announced that the enhanced ACA premium subsidies will be available beginning April 1, 2021, it will likely take time for federal and state agencies to implement all of these changes, including updates to marketplace subsidy eligibility systems, drafting of model notices, granting of funds, and revision of tax forms and filings.

The Biden Administration is likely to continue its strong start in promulgating laws and guidance to reinforce the ACA and further healthcare access. We will continue to monitor and provide updates as they come.

FOOTNOTES

[1] "Opportunities and Resources to Expand Enrollment During the Pandemic and Beyond," by Karen Pollitz and Jennifer Tolbert, Kaiser Family Foundation (Jan 25, 2021)

[2] Id.

[3] "How the American Rescue Plan Will Improve Affordability of Private Health Coverage," by Karen Pollitz, Kaiser Family Foundation (March 17, 2021).

[4] Id.; "Final Coverage Provisions in the American Rescue Plan and What Comes Next," by Katie Keith, Health Affairs (March 11, 2021).

[5] "Final Coverage Provisions in the American Rescue Plan and What Comes Next," by Katie Keith, Health Affairs (March 11, 2021).

[6] Id.

[7] Insurer Participation on the ACA Marketplaces, 2014-2021 | KFF

[8] Final Coverage Provisions In The American Rescue Plan And What Comes Next | Health Affairs

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