

What Does a Donald Trump Presidency Mean for Group Health Plans and Your Obligations as an Employer?

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Introduction

The election of Mr. Trump will likely bring some relief to employers and individuals who are wrestling with the rigors of compliance with the Affordable Care Act (“ACA”). We caution, however, that until the government acts to make the changes promised by Mr. Trump, the current legal structures remain in place and compliance with the ACA must continue, until those actions are taken and they become effective.

More importantly, Employers should take note that many of the long-standing and foundational legal requirements under the federal Employee Retirement Income Security Act (“ERISA”) and a number of provisions of the U.S. Tax law, and other related laws, such as the Health Insurance Portability and Accountability Act (“HIPAA”), are not going to be substantially changed by any repeal of ACA.

***The long standing legal requirements under ERISA
and related laws, are not going to change even with a repeal of ACA***

Employers should not falsely believe that the Trump Administration will be lax on enforcement of ERISA rights. In fact, just the opposite is likely, because of the background of those likely to lead the Trump Administration. Moreover, Mr. Trump has made many promises to those who supported his election, and reducing decades old core rights and obligations that flow to benefit and protect his supporters is not likely to happen and is not on the radar of items that they seek to change.

No doubt, the coming weeks and months will prove interesting, if not also challenging. There is a great deal of chaotic banter involving ACA. The Trump campaign and transition sources, Republicans, Democrats and the media are asserting, squabbling, assuming, posturing and generally discussing and re-discussing the potential of a complete or partial repeal of ACA. There is still a great deal of uncertainty in terms of what the Republicans and the Trump Administration will do. Even with a repeal or partial repeal of ACA, the fundamental requirements of the ERISA law and many related legal requirements, including HIPAA are not going to be changed.

Information available to date, demonstrates tensions in conflicting goals and aims of the Trump platform and the Republican Congress. This tension exists before we even consider the position of the Democrats. Actions to repeal or partially repeal ACA are subject to many complex legislative rules, and there still exist rights of a Democratic minority filibuster on certain bills presented to the Senate, with such filibuster acting to block certain of the actions that may be taken. Work-arounds from the budget reconciliation process as an alternate means is possible, but this process can only address the revenue portions of the law, and not potentially many other

ACA requirements. It is anticipated that even if action is taken, it will have some delayed effective dates. When the Affordable Care Act is ultimately repealed, in whole or in part, the resulting structures, rules, and tax framework is still completely uncertain. Also, and importantly, the reaction of the insurance industry and the impact on policies and rates is another complete uncertainty.

A Recent Development – the 21st Century Cures Act

Recently, just prior to the close of 2016, Congress passed and President Obama signed into law the 21st Century Cures Act. This Act did a number of things related to health, but in particular for employee benefits, it created new Qualified Small Employer Health Reimbursement Arrangements or “Qualified HRAs.” These new arrangements for employers who are not Applicable Large Employers (more than 50 full-time equivalents), will offer to some smaller employers a viable interim or permanent alternative. Of course, there are a number of rules and limits involved, including the requirement that the participating employer have no group health plan and that the participants obtain Minimum Essential Coverage or their benefits will be subject to tax. To undertake this new Qualified HRA, a very detailed and specific ninety day (90) notice period is required. Stand by on this new law. EZ ERISAPlan is busy evaluating it, talking to our Partners about it, and there are more details below.

So, we enter the New Year with some chaotic uncertainty when it comes to employer sponsored health coverage. But caution – even with a full or partial repeal of ACA, certain basics will still be there.

Here are some important questions and answers for employers of all sizes to consider:

Will Trump and the Republicans will Repeal Part or All of the Affordable Care Act?

Likely. It has been a constant mantra of most Republicans and Mr. Trump that he would work to repeal the Affordable Care Act. But, the Trump Administration will likely keep certain aspects of the law, to protect those who supported his campaign. According to the Trump for President website, and recent and prior statements by Mr. Trump, there are certain aspects that appear likely to be preserved or changed. These are:

- Preserve the prohibition on preexisting condition exclusions.
- Preserve and potentially expand the use of HSAs - Health Savings Accounts
- Preserve some type of availability of insurance for those who need it (“We must also make sure that no one slips through the cracks simply because they cannot afford insurance. We must review basic options for Medicaid and work with states to ensure that those who want healthcare coverage can have it”)
- Improve health care information and billing transparency

What other changes has Mr. Trump proposed that might affect Health Benefits?

- Repeal the individual mandate
- Potentially repeal the employer mandate
- Permit the sale of health care insurance nationally and across state lines
- Allow individuals to fully deduct health care insurance premiums

- Potential expansion of HSAs – Health Savings Accounts
- Remove barriers to entry into free markets for drug providers that offer safe, reliable and cheaper products
- Allow consumers access to imported, safe and dependable drugs from overseas to bring more options to consumers
- Reduce the number of individuals needing access to programs like Medicaid and Children’s Health Insurance Program (methodology unspecified)

What do we do until this happens?

Remember, that it will take time for the appropriate legislation to be prepared to repeal the Affordable Care Act, and to provide for legislation that will include some of the new Trump provisions. Then, it will take time for the government to act.

So, for now, stay the course and continue doing what you are doing. At present, until any repeal, you must comply with the Affordable Care Act.

Will this change the basic ERISA requirements?

No. Not likely, and very likely no. Remember that Mr. Trump’s approach has been to support his constituency, which is in large part the working person. To keep his promises to this constituency, and based upon the disclosures, there is not stated intent to attempt to remove or alter any material fundamental ERISA requirement.

The requirement of Plan Documents, the requirements of Summary Plan Descriptions, the requirements of Annual Reports and reporting, the auditing and evaluations by government in this regard will continue.

Employers should be mindful that the basic requirements under ERISA for proper Plan document and Summary Plan Descriptions are not affected by a repeal of ACA and the civilian, non-political employees of the Internal Revenue Service and U.S. Department of Labor will continue enforcement actions.

The only potential fundamental change to ERISA relates to the potential of health insurance sales across state lines. Mr. Trump has favored a view of increased competition that will result from insurers having greater access to national markets. This would likely require an amendment to the ERISA Savings Clause to permit health insurers to have access to broader markets without the need for state insurance department supervision. This would permit, in theory, the sale of insurance product across state lines. There is a great deal of uncertainty in this approach, but this is the only core ERISA principal that appear to be within the scope of potential changes.

Do I still need to have a Plan Document and Summary Plan Description as required by ERISA?

Yes. Because Mr. Trump is focused on the support of his constituency and his platform supports their rights, there is no plan to eliminate these basic ERISA requirements.

Will this change the HIPAA privacy protections?

No. Such a change is not likely. The Trump platform has not specifically mentioned any removal of the protections of HIPAA in regard to privacy. Mr. Trump would not likely remove privacy protections that work toward protecting the personal information of the Trump constituents.

HIPAA rules and policy, like an employee handbook or other set of rules and requirements provides guideposts for protection of Protected Health Information, and provides important protection for Employers regarding the use and disclosure of such information, even in cases where Employer's access to such information is limited.

Do I still need a HIPAA Policy and Rules?

Yes. Mr. Trump has not mentioned any changes to these privacy protections. The need to protect employer plans and employer staff, and to have rules and policies in this regard still very much exists. It is unlikely that these protections will be diminished or affected and they are not connected directly to any repeal or partial repeal of the Affordable Care Act.

Do I still need a Cafeteria Plan Document?

Yes. If anything, Mr. Trump may expand the rules under the cafeteria plan statute to expand health savings accounts. The law requires the appropriate documentation for such plans and there have been no statements that would alter this.

Do I still need a Health Reimbursement Account Plan document?

Yes. If you maintain an integrated HRA (integrated with your existing ACA compliant group health plan) you will still need the documentation. If you are an Applicable Large Employer that maintains a health reimbursement account plan along with your group health plan, you need a Plan Document and Summary Plan Description to support that plan, including any HRA component.

Small employers may be eligible for the new 21 Century Cures Act, Qualified Small Employer Health Reimbursement Arrangement. See below for more information on this new law.

Is the Qualified Small Business Health Reimbursement Account Arrangement (“Qualified HRA”) an alternative to consider?

Possibly for Small Employer, but It May Not Provide That Much Relief. If your entity is not an Applicable Large Employer (more than 50 full time equivalents), you may be eligible for this optional special form of Health Reimbursement Arrangement. There are a number of requirements to be aware of, as you consider this as an option, and the purchase of traditional insurance with employee contributions, may still be a better way to provide a valuable benefit.

Importantly, if your Company is a small employer eligible for the Qualified HRA:

- Your Company must provide the Qualified HRA to everyone who is eligible on the same terms for single or family coverage;
- Your Company must fully fund the amounts (no employee contributions);
- Your Company cannot not offer a group health plan;
- The Qualified HRA pays or reimburses medical expenses under Code Section 213, which can include medical expenses and insurance premiums;
- Reimbursements are limited to \$4,950 for employee only and \$10,000 for family coverages, pro-rated for partial years and indexed in amount in the future;
- Your Employees must obtain minimum essential coverage, or the Qualified HRA amounts will be subject to tax; and
- Your Employees who purchase a plan on the Marketplace Exchange will have the premium tax credit reduced by the benefit available under the Qualified HRA.

Under the Qualified HRA, coverage must be offered to all Employees except:

- ✓ Employees with less than 90 days of service
- ✓ Employees who are younger than age 25
- ✓ Employees who are part-time or seasonal
- ✓ Employees who are union employees or non-resident aliens.

A Notice requirement is mandatory and requires ninety (90) days advance notice before the Plan year. The notice has to include the amount of the Qualified HRA, a statement that if the employee applies for the tax credit for health insurance on the Marketplace Exchange that the employee must report the full amount of the Qualified HRA, and that the employee must have minimum essential coverage or the Qualified HRA amounts will be subject to tax.

EZ ERISA is studying this new legislation and is busy evaluating the need for a Qualified HRA Plan Document Form Subscription

What do I do now?

Now, is a great time to get the basics in line, so you do not have to worry about how you will deal with Plan compliance going forward. Here is what is strongly suggest:

- **Make sure you have your Wrap Plan Document/Summary Plan Description in place. Don't wait until the DOL or IRS or a Participant, or their Lawyer to come knocking!**
- **Obtain appropriate HIPAA Rules, Policies and forms and get training. Don't be caught off-guard. Get the protection of a Policy and Rules.**
- **Evaluate your Cafeteria Plans and HRA arrangements for updated documentation.**

Stay tuned, the chaotic uncertainty will be an adventure!