

BREAKING NEWS

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Employee Benefits
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PRESIDENT TRUMP SIGNS FIRST EXECUTIVE ORDER ON THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

Executive Summary

- President Trump intends to repeal the Patient Protection and Affordable Care Act (ACA) as evidenced by his Executive Order, signed on January 20, 2017.
- Until full repeal of the ACA is accomplished, the executive branch will ensure that it takes all action necessary to “minimize the unwarranted economic and regulatory burdens of the ACA” to the “maximum extent permitted by law.”
- States will be given more flexibility and control over the healthcare market, and the administration will encourage interstate commerce through the development of a free and open market of healthcare services and insurance.
- The Secretary of Health and Human Services (HHS) and other executive departments/agencies shall exercise authority to “waive, defer, grant exemptions from, or delay any provision” of the ACA, “that would impose a fiscal burden on any State, or a cost, tax, penalty, or regulatory burden on individuals, families, health care providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products, or medications.”
- Currently, the Executive Order does **not** specifically provide relief to “employers” from a “cost, tax, penalty, or regulatory burden” that may be currently imposed on them, **so employers should continue to comply with employer requirements under the ACA**, until further notice.

Executive Order

On January 20, 2017, President Trump signed an Executive Order which could potentially begin the process of repealing the Patient Protection and Affordable Care Act (ACA). However, the Executive Order is fairly broad, and does not specify which parts of the ACA will be repealed. In addition, in order to rescind/repeal existing regulations within the ACA, the agencies must comply with the guidelines under the Administrative Procedures Act (APA), which means the agencies must engage in a new notice and comment rulemaking process (including a required public comment period and delayed effective dates). This process complicates the complete rescission and repeal of the current regulations under the ACA, and more so makes the Executive Order a symbolic gesture at this time (because the agencies can only act “to the maximum extent permitted by law”). However, any new regulations, including any regulations which may not yet have taken effect, can be suspended. The President’s Chief of Staff has instructed agencies to cease issuing new regulations and withdraw any rules which have been sent to the Office of the Federal Registrar until they can be reviewed by the new agency heads. The Executive Order is broken into six (6) sections, which are discussed below.

Section 1 – Pending Repeal

Section 1 provides that the intent of the Executive Order is to begin the process of the repeal of the ACA. It states that until the time the ACA is fully repealed, the executive branch will minimize any “unwarranted economic and regulatory burdens of the ACA,” to allow States more flexibility and control to encourage a more “free and open” healthcare market. Section 1, however, does not specifically address which provisions of the ACA will be repealed.

Section 2 – Waive, Defer, Grant Exemptions from Fiscal Burdens of the ACA

Section 2 permits the Secretary of Health and Human Services (HHS) and the heads of other executive departments and agencies under the ACA to exercise authority to “waive, defer, grant exemptions from, or delay the implementation of any provision or requirement” of the ACA that imposes a “fiscal burden” on a State or a “cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products, or medications.”

This language seems to indicate that the intent of the Trump Administration is to relieve as many of the financial burdens associated with the ACA on the healthcare market as possible, including the effects of the financial burdens of the law on States or individuals.

Section 3 – Greater Flexibility to States

The Secretary of HHS and all other heads of other executive departments and agencies shall exercise all authority and discretion to create more flexibility for States and shall “cooperate with them in implementing healthcare programs.”

Section 4 – Free and Open Market

The head of each department or agency shall encourage the development of a “free and open market” in the offering of healthcare services and health insurance, with the goal of providing options for patients and consumers through interstate commerce

Section 5 – Compliance with the Administrative Procedures Act

The Executive Order will follow the requirements of the Administrative Procedures Act (APA), which requires that any future revision of the regulations will be done through notice-and-comment rulemaking.

Section 6 – Does not Affect Certain Other Laws

The Executive Order:

- Shall not affect the authority already granted by law to the heads of an executive department or agency
- Shall not affect the functions of the Director of the Office of Management and Budget
- Shall be implemented consistent with applicable law, subject to the availability of appropriations
- Is not intended to, and does not, create any “right or benefit, substantive or procedural, for a party against the United States, its departments, agencies, entities, its officers, employees, or agents, or any other person.”

Conclusion

From an employer perspective, until further regulatory guidance is released, the final regulations implementing the Employer Mandate and its reporting requirements remain in effect and are subject to enforcement by the IRS. Once President Trump’s appointments to the regulatory agencies occur, new regulations will most likely be proposed to ease the ACA’s economic and administrative burdens, although the process will take some time.

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