"Trumpcare" The Latest Efforts to Repeal and Replace The Affordable Care Act

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With the election of Donald Trump and the retention of power by Republicans in both the House of Representatives and Senate, changes to the Patient Protection and Affordable Care Act ("ACA") have become a focus of those in power, especially those who have been promising a repeal of the ACA. Since the election, the President has made a number of comments about various provisions of the current ACA and several members of Congress have proposed alternatives to replace the ACA. Despite House Speaker Paul Ryan's plan recently coming to the forefront and being backed by the President, its recent removal from consideration by the House of Representatives has left much up in the air concerning what "Trumpcare" might ultimately look like. As a result, it remains important to understand the various proposals being lobbied to better understand what might replace the ACA.

There are four principal frameworks that have been proposed at various points in time over the past couple years: (1) the Empowering Patients First Act by Tom Price[1], (2) A Better Way Forward by Paul Ryan[2], (3) the Patient CARE Act by Richard Burr, Fred Upton and Orrin Hatch[3], and (4) H.R. 3762[4] passed by Congress in 2016 and vetoed by then President Obama. Each alternative framework contains subtle differences from the others but in each proposal there are sweeping changes to the ACA.

Key Aspects of the ACA That Are Likely To Be Impacted

Probably the most controversial aspect of the ACA is the individual and employer mandates, which require individuals and employers over a certain size to maintain insurance for themselves and their employees, respectively, or be penalized via a tax for failing to maintain insurance. Under all of the above proposed frameworks, both mandates would be repealed. Those who believe these provisions are unconstitutional, despite the final holding by the Supreme Court to validate the individual mandate as a constitutional tax, will applaud such a change. However, it will also pose a challenge as most acknowledge that keeping costs down and health care services comprehensive require the young and healthy to be in the insurance pool to maintain the markets' financial viability. Much more debate is likely to occur on this issue in assessing the viability of any proposed replacement options.

The mandate also directly impacts the viability of the ACA's prohibition against insurers either denying coverage or charging significantly more for those with preexisting conditions (also known as guaranteed issue). Eliminating the mandate but keeping this prohibition in place would effectively allow people to buy insurance, at no greater expense, after they developed a medical condition. Insurance, however, cannot survive under such a model. Thus, in conjunction with the elimination of the mandates, each of the above proposed frameworks (except H.R. 3762) maintain guaranteed issue at standard rates but only for individuals that maintain continuous coverage. Moreover, individuals with coverage gaps may be subject to medical underwriting and assigned to high-risk pools. Thus, there will be a trade-off to eliminating the mandates to ensure the system is not abused.

One of the key changes to the ACA under each of the frameworks (except H.R. 3762) would be to revise how tax credits are provided to individuals not insured through their employer. Under the current ACA, individual income is measured and utilized to assess for how much of a tax credit an individual will qualify. In other words, the lower an individual's income, the greater the tax credit they qualify to receive. The proposed frameworks similarly provide for tax credits but make them

uniform for all individuals based on age rather than income. The one exception is the plan by Burr/Upton/Hatch that also phases out the tax credit above 300% of the federal poverty level. Many opposed to this revision to the ACA point out the lack of sensitivity to income and worry that those able to afford insurance will be receiving the same tax credit as those in poverty. There is sure to be much more debate on this point in the future as their was in debating House Speaker Ryan's bill.

These frameworks also generally eliminate all taxes under the ACA, return to the states oversight over ratings issues and plan requirements, permit the sale of insurance across state lines and expand the benefits of health savings accounts. Currently, the ACA mandates certain minimum essential health benefits for all insurance plans. The proposed frameworks all seek to eliminate these requirements thereby giving the states more control and insurers more flexibility to craft products based on customer demand rather than government mandate. These revisions all flow from a common theme of returning control over health insurance to the states and attempting to provide more options to individuals. Proponents of replacing the ACA believe these changes are necessary given the fact that many of the health insurance exchanges created under the ACA have closed or whose options have been significantly restricted following the exodus from those states of numerous insurers who determined they could not make money on the exchange. Opponents remain skeptical that plans will lack critical health services without certain minimum requirements in place and that customers will be confused and be less able to compare products without the standardization created by the ACA.

The Fate of Medicaid Expansion

In addition to the changes discussed above, one of the most impactful aspects of the proposed repeal and replace options is the elimination of Medicaid expansion. This aspect of the ACA provided reimbursement to providers for an entirely new population of patients previously uninsured, many of whom would qualify, at best, for charity care. In fact, the State of New Jersey has decreased its charity care subsidy allocation as a result of the Medicaid expansion.

If Medicaid expansion is in fact eliminated, there is likely to be some sort of transition period to allow for the necessary preparations to be made. Elimination of Medicaid expansion is likely to take the form of a repeal of both the expanded eligibility category of low-income adults with income up to 133% of the federal poverty line along with repeal of the enhanced federal funding for newly-eligible adults. Such a change would mean providers would once again lose the reimbursement for a significant population of patients as many of these individuals, even with government subsidies, cannot otherwise afford to purchase insurance. Moreover, reimbursement for the remaining Medicaid patients would decrease with the elimination of the enhanced funding. It is estimated that such a change would impact over 11 million newly eligible adults worth over $55 billion in federal funding.[5] In New Jersey alone, elimination of Medicaid expansion is expected to impact over 500,000 individuals with an estimated federal funding of over $10 billion.[6] Without this significant federal funding going to the states it remains to be seen how each state will adjust to the drop in revenue. Cuts to state programs or increases in taxes are two likely outcomes to make up the difference.

Many wonder whether anything will replace Medicaid expansion if repealed. The plans by Ryan and Burr/Upton/Hatch call for a shift in Medicaid financing to one funded by block grants or per capita caps. Such changes could allow for funding for lower-income patients as these financing mechanisms provide a fixed grant to each state (in the case of block grants) or a fixed grant based on the total Medicaid population (in the case of per capita caps) with the states then left to decide how best to run their Medicaid programs. Arguably states could then seek to expand eligibility criteria. Proponents argue this will provide greater flexibility similar to the way 1115 waiver programs allow for innovation. Opponents, however, see a decrease in overall funding, and thus, an almost certain drop in eligibility and services covered.

No doubt the ultimate impact of eliminating Medicaid expansion will turn on the details of what it is replaced with in the future. Regardless of how Medicaid expansion is changed or repealed, states, providers and patients will be forced to adapt.

What's Next?

President Trump's February 28, 2017 address to Congress identified key principles he believed were necessary for a better health care system. They included:

1. Access to coverage for all Americans with pre-existing conditions along with a stable transition for Americans currently enrolled in the healthcare exchanges.
2. Assistance to Americans to purchase their own coverage through tax credits and expanded health savings accounts with plan options that Americans want, not plans forced upon them by the government.
3. Provide state governors the resources and flexibility with Medicaid to make sure no one is left out.
4. Implement legal reforms that protect patients and doctors from unnecessary costs that drive up the price of insurance – and bring down the artificially high price of drugs.
5. Provide Americans the freedom to purchase insurance across state lines.

Shortly after the President's address, House Speaker Ryan's plan came to the forefront and as recent as March 23, 2017 was going to be presented on the floor of the House

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of Representatives for a vote. However, at the last minute it was pulled due to a lack of support. In particular, the House Freedom Caucus, a coalition of conservative Republicans in the House of Representatives, refused to support the bill mainly due to concerns it continued the entitlement program created by the ACA, except in a new form. Consequently, without their support, House Speaker Ryan, and the President who had supported the bill, lacked the votes for its passage.

Many have viewed these events as a set-back for the Administration and those seeking to repeal and replace the ACA. However, despite the belief by many that the issue is now deadlocked given the Republicans' inability to unite around one bill, as recent as March 28, 2017 House Speaker Ryan indicated he intends to continue working on legislation to repeal and replace the ACA.

What many had hoped would be a swift drafting, debate and passage to repeal and replace the ACA has now become a much more deliberate and prolonged process. Given the deep divides between the various factions of the Republican Party, absent a breakthrough between the various groups it is unlikely Congress and the American people will see a vote on a final bill until at least later this year. Between now and then there is sure to be much more debate and analysis of what has and has not worked in the current ACA along with what will and will not work in the various proposals being made. It remains to be seen whether Republicans missed their opportunity and whether the shift in focus to other policy agenda items will kill momentum for those seeking to fulfill the repeal and replace campaign promise.

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Endnotes

[1]https://www.congress.gov/bill/114th-congress/senate-bill/2519/text
[2]http://paulryan.house.gov/healthcare/pca.htm
[3]https://www.finance.senate.gov/imo/media/doc/The%20Patient%20Choice,%20Affordability,%20Responsibility,%20and%20Empowerment%20Act.pdf
[4]https://www.congress.gov/bill/114th-congress/house-bill/3762
[5]Repeal of the ACA Medicaid Expansion: Critical Questions for States, State Health Reform Assistance Network, December 2016 – www.statenetwork.org
[6]Id.