

SIG University Upcoming Events

October 25th

HR Roundtable: Employee Engagement

Speaker – Joe Mechlinski , NYT's Best Selling Author and CEO of SHIFT

November 16th

HR Roundtable: FMLA

Speaker: Laura Rubenstein, Esq, Partner, Wright, Constable & Skeen, LLP



SIG University Upcoming Events- Webinars

October 11th, 12pm – 1pm EST

Introduction to Consumer Directed Healthcare and Account-Based Plans:
HDHPs, HSAs, FSAs, and HRAs

October 25th, 12pm – 1pm EST

New & Emerging HR Technologies



What's New with the ACA?

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Agenda

- The State of Obamacare
- The State of the Union – Or At Least Those in Washington
- The State of the States
- Rulings & Cases to Consider



The State of Obamacare

The State of Obamacare

IT'S NOT HEALTHY

Individual Market

- The Individual Market is the Heart of Obamacare
 - Idea was to provide those traditionally unserved *access to affordable care*
- Access
 - Uneven across the states
 - Many carriers exited or are threatening to exit the individual market
 - Majority of states now have fewer carriers offering coverage than at start of Obamacare
 - Aetna exiting 11 states, following Humana, UnitedHealth and others
 - *Every country in the US now has at least one Marketplace plan available*



The State of Obama Care

IT'S NOT AFFORDABLE IN MANY MARKETS

Average Premium Increases in Select Exchanges in 2016

Ohio	13%
Florida	20%
North Carolina	20%
New Hampshire	30%
Wisconsin	30%
Indiana	36%
Pennsylvania	40%
Illinois	44%

Are the exchanges in a Death Spiral?

- April 2017 S&P study looked at the performance of many Blue Cross across the country
- Study shows that the carriers significantly reduced their losses last year, are likely to break even this year and that most could profit at 2018
- Confirms CBO analysis



The State of Obamacare

Future Looks Grim

- President Trump Threatens to Stop CSRs
 - What are CSRs?
 - Cost-sharing Reduction Payments designed to repay carriers for cost of providing low-cost health care (and subsidizing Congressional coverage)
 - *Can the President Legally Stop CSRs?*
 - Live by the sword – die by the sword
 - *What Happens if CSRs Cease?*
 - The threat has already shown us the future
 - Less access and higher cost



The State of Obamacare

Appearance & Reality

- CBO Reports Indicated that **20 Million** *Newly Covered* Under Obamacare Would Lose Coverage under the Replacement bills
 - ***Real Number is Probably Closer to ½ That***
 - Even so, 10 Million *is* a large number... ~3% of the U.S. Population
 - ***Where lies the Discrepancy?***
 - Most of the other 10 Million had Insurance or access to Insurance before Obamacare
 - *Employer's Plan*, Medicaid, Parent's Plan, Student Insurance, Individual Market were all Pre-Obamacare Sources



The State of Obamacare

Reality for Employers

- 40% - 60% of those receiving subsidies are *Ineligible*
 - Self-Policing Does Not Work
 - Government just getting going with Cross-Checking
 - Recoupment for Funds previously expended is still on the Table



The State of Obamacare

WHO'S TO BLAME?



The State of the Union: Or At Least Those in Washington

115th Congress

POLITICAL CURRENTS

Current Congress	
House:	241 - 194
Senate:	52 - 48



A Party Divided



R. Portman (OH)



R. Paul (KY)



S. Collins (ME)



M. Lee (UT)



S. Moore Capito (WV)



L. Murkowski (AK)



J. Moran (KS)



T. Cruz (TX)



R. Johnson (WI)



D. Heller (NV)



J. McCain (AZ)



115th Congress

2018 House and Senate Outlook
33 Senate seats (8/25)
All House seats



Repeal and Replace

DIFFERING PHILOSOPHIES

Democrats:	Defined Benefit Model
Republicans:	Defined Contribution Model



Republicans:
217—YES
20—NO

American
Health Care Act
(AHCA)
Passed in the House
May 4, 2017
(217-213)

Democrats:
0—YES
193—NO

	Affordable Care Act (ACA)	American Health Care Act (AHCA)
Mandates	<ul style="list-style-type: none"> Individual mandate Employer mandate on ALE's 	<ul style="list-style-type: none"> No individual or employer mandate eff. retro to 1/1/16 Insurers can impose a one year 30% surcharge on consumers with a lapse in continuous coverage
Assistance	<ul style="list-style-type: none"> Income-based subsidies for premiums that limit after-subsidy cost to a percent of income Cost sharing reductions for out-of-pocket expenses 	<ul style="list-style-type: none"> Age-based refundable tax credits for premiums (\$2,000 - \$4,000), phased out for higher incomes No cost sharing reductions for out-of-pocket expenses ACA subsidies phased out after 2019; AHCA credits effective in 2020
Premium Age Differences	<ul style="list-style-type: none"> 3:1 	<ul style="list-style-type: none"> 5:1 (MacArthur amendment would allow a ratio above 5:1)
Medicaid	<ul style="list-style-type: none"> Matching federal funds to states for anyone who qualifies Expanded eligibility to 138% of poverty level income 	<ul style="list-style-type: none"> Federal funds granted to states based on a capped, per-capita basis starting in 2020 States can choose to expand Medicaid eligibility, but would receive less federal support for those additional persons
Health Savings Accounts	<ul style="list-style-type: none"> \$3,400/\$6,750 contribution limit for 2017 	<ul style="list-style-type: none"> Increased to match HDHP OOP limits (\$6,550/\$13,100 for 2017)
“Cadillac” Tax	<ul style="list-style-type: none"> Cadillac tax on high-cost plans implemented in 2020 	<ul style="list-style-type: none"> Cadillac tax on high-cost employer plans delayed until 2026
Other Taxes	<ul style="list-style-type: none"> 3.8% tax on net investment income 0.9% Medicare tax on individuals with income over \$200,000 (or families with income over \$250,000) Limit placed on contributions to health FSAs Annual health insurance provider tax OTC medication excluded as qualified medical expense 	<ul style="list-style-type: none"> Repeal of these taxes retroactive to the beginning of 2017 (except for the repeal of the Medicare tax, which would begin in 2023)
Essential Health Benefits	<ul style="list-style-type: none"> Insurers are required to offer ten essential health benefits (individual and small group plans) 	<ul style="list-style-type: none"> MacArthur amendment: individual and small group plans must offer the ten essential health benefits, but a waiver option is available Mental health and substance abuse not required in some Medicaid plans
Pre-Ex/Age 26/No Limits: Same		

Amendments to AHCA

Tom MacArthur (Tuesday Group co-chair)

Mark Meadows (Freedom Caucus chair)

Insurance Market Provisions

The MacArthur Amendment would:

- Reinstate Essential Health Benefits as the federal standard
- Maintain the following provisions of the AHCA:
 - Prohibition on denying coverage due to preexisting medical conditions
 - Prohibition on discrimination based on gender
 - Guaranteed issue of coverage to all applicants
 - Guaranteed renewability of coverage
 - Coverage of dependents on parents' plan up to age 26
 - Community Rating Rules, except for limited waivers

Limited Waiver Option

The amendment would create an option for states to obtain Limited Waivers from certain federal standards, in the interest of lowering premium costs and expanding the number of insured persons. States could seek Limited Waivers for:

- Essential Health Benefits
 - States could set their own definition of EHBs for the individual and small group markets starting in 2020, and increase the age rating ratio above 5:1 starting in 2018
- Community rating rules, except for the following categories, which are not waivable:
 - Gender
 - Health Status (unless the state has established a high risk pool or is participating in a federal high risk pool)
 - Health status underwriting only permitted for a limited duration and only for those with a lapse in coverage (63 days)

Limited Waiver Requirement s

States must explain how the waiver will benefit the insurance market in their state, such as reducing average premiums, increasing enrollment, stabilizing premiums for individuals with pre-existing conditions, or increasing the choice of health plans. Applications are automatically approved within 60 days unless denied by HHS.

Senate Response

HARD TO FIND MIDDLE GROUND BETWEEN CONSERVATIVES AND MODERATES

- Conservatives generally do not want taxes or subsidies
- Moderates concerned about the number of individuals who may lose coverage
- “Skinny Repeal” effort placed Obamacare on the Back Burner – Or did it?
 - Lamar Alexander (R, TN) Chair of Health, Education, Labor and Pensions & Patty Murray (D, WA) said to be working on bi-partisan bill
 - Bill Cassidy (R, LA), Lindsey Graham (R, SC), Dean Heller (R, NV) and Ron Johnson (R, WI) to introduce a bill allowing states to decide fate of ACA



A Way Out?

Democracy is
so overrated.



Some Modest Proposals

- Fix the Affordable Care Act – It's Broken – But Aim Small, Miss Small
 - Republicans should try to avoid the key mistake the Democrats made with Process
 - Fill Regulatory Positions
 - Consider Addressing *The Problem*



Some Modest Proposals

AVOID KEY MISTAKE MADE BY DEMOCRATS

- **Cost of Healthcare and Paying for it is a Bi-Partisan Issue**
- Democrats in 2009 – 2010 passed ACA on a Strictly Partisan Vote
- Republicans should attempt to fix ACA on a Bi-Partisan Basis
- Politics will get in the way and Voters should make them All pay



Some Modest Proposals

FILL REGULATORY POSITIONS

- At last count:
 - No nominee for 320 out of 599 key agency posts
 - 159 Nominees
 - 117 Confirmed
- Laws are interpreted by agencies



Some Modest Proposals

CONSIDER ACTUALLY ADDRESSING THE PROBLEM

Problem is not the way we pay for insurance

- Problem is the cost of healthcare
 - Tort Reform
 - Sale of Health Insurance Across State Lines
 - Pharmaceutical Reform
 - Hospital Billing Reform
 - Enforcement of Sherman Act and Other Federal Laws – Curb Monopolization
 - Focus on Quality



The State of The States

State of the States

THIS ALL STARTED WITH THE STATES

- **Uninsured Perceived to be Driving up Healthcare Costs**
- Massachusetts Passed Universal Health Care Law in 2006
 - Introduced Individual and Employer Mandate/Penalty Structure
 - Many of the Provisions found a way to Obamacare
 - Individual Mandate still the Law in Massachusetts



State of the States

STATE RESPONSES

- **Vermont: Single Payer (Abandoned)**
- Colorado: Single Payer (Failed)
- California: Considering Single Payer?
- Massachusetts: Again Taking the Lead?
 - Governor's Proposal
 - Replace State Employer Mandate (not currently in effect) with increased Employer assessments and Cost-Savings changes at Mass Health
 - State Legislature
 - OK with Increased Employer assessments but against Cost-Saving Measures



Rulings and Cases to Consider

Rulings and Casings to Consider

Thomas v. CIGNA Group Ins., 2015 WL 893534 (E.D.N.Y. 2015)

- Life insurance Case
- Disabled employee ceased making life insurance payments *but did not file the available waiver*
- Carrier denied claim
- Employee's beneficiaries claimed notice of need to file waiver was not sufficiently provided
- Court found plan sponsor with faulty **electronic delivery** system did not meet ERISA's standards

Learning from Thomas

- ERISA's electronic delivery rules are complex
- Merely placing SDP's on company websites, without notice to participants of their availability and significance (and the right to a paper copy), will not satisfy ERISA'S requirement
- Distribution method must be reasonably calculated to ensure actual receipt and result in full distribution



Rulings & Casings to Consider

Hively v. Ivy Tech Community College, No. 15-1720 (7th Cir. April 4, 2017)

- Federal appeals court held that Title VII of the Civil Rights Act prohibits workplace discrimination based on sexual orientation
- Was the first time a federal appeals court has said that Title VII's ban on sexual discrimination prohibits bias based on sexual orientation
- Ruling also comports with the EEOC's view that sexual discrimination necessarily includes bias based on an individual's sexual orientation
- Recent panel discussions in the 2nd and 11th circuits have held that Title VII does not provide such protections

Learning from Hively

- Those with discrimination claims based on sexual orientation or gender identity now have cognizable claims under Title VII
- Provides an opportunity for employers to retrain managers on these issues, review policies and procedures
- Supreme Court review likely



Rulings & Cases to Consider

AARP v. EEOC, D.D.C., No. 16-2113 (August 2017)

- Federal court in DC has ordered Equal Employment Opportunity Commission to reconsider limits it placed on wellness incentives
- Court found that EEOC did not properly consider whether the 30% limit would ensure the program remained “voluntary” as required by the ADA and GINA
- In the meantime, “to avoid disruption” court has allowed the limits to remain in place while the EEOC determines how it will proceed

Learning from AARP

- Any new rules would likely contain a transition period for employers
- In the short term, employers may use 30% limits; however it is possible the court’s decision may open the door for employee challenges



Compliance Attention

AFFORDABLE OFFERS OF EMPLOYER-SPONSORED HEALTH COVERAGE IN 2018

Rev. Proc. 2017-36 – used to determine affordability threshold

- Under the ACA, applicable Large Employers who wish to offer “affordable” coverage cannot charge more than **9.5%** of an employee’s household income or other metric as determined under the “safe harbor” provisions (e.g., W-2 income, Rate of Pay, Federal Poverty Level) for employee Coverage
 - 2015: 9.56%
 - 2016: 9.66%
 - 2017: 9.69%
 - 2018: 9.56%
- Draft 2017 ACA Reporting & Instructions available
 - Few Changes, mostly relating to removal of Transition relief



ACA Reporting Update

Treasury Inspector General for Tax Administration (TIGTA) Reports

- Employer Report
- IRS intended to begin sending employer mandate penalty notices for 2015 “early in 2017)”
 - Funding cuts have slowed efforts to get assessments out
- IRS has begun sending “applicable large employer” notices to employers (requests for Forms 1094-C / 1095-C)
- As of October 2016, IRS processed 440,000 Forms 1094-C and 110 million Forms 1095-C
 - 65,000 Forms 1094-C and 4.6 Million 1095-C filed on Paper
 - IRS unable to process paper filings timely and accurately: as of October 2016, 16,000 paper Forms 1094-C and 1.4 million paper Forms 1095-C had not been processed



ACA Reporting Update

Treasury Inspector General for Tax Administration (TIGTA) Reports

- Individual Taxpayer Report
- As of March 2, 2017, IRS processed 1.7M tax returns that reported nearly \$6.4B in Premium Tax Credits
- 1.8M taxpayers made shared responsibility payments – down from 2.7M the prior year (33% decrease)
 - However, the amount of payments increased 20% to \$1.2B
- 63,000 individuals accurately predicted their 2016 income
- 650,000 individuals were entitled to an additional tax credit
- 1,000,000 individuals had excess payments subject to repayment
 - \$830M in excess payments: \$565M repaid, \$265M outstanding



Questions?

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