



January 23, 2017 | LEGAL ALERT

## Benefit Advisors Network Smart Partners

# LEGAL ALERT

### President Trump Issues Executive Order on the Affordable Care Act

President Trump moved swiftly after taking office on Friday, issuing an Executive Order intended to minimize the economic and regulatory burdens of the Affordable Care Act ("ACA"). The order is somewhat symbolic and has no immediate effect on employers, many of whom are in the process of complying with the ACA's onerous reporting requirements (Forms 1094 and 1095), which are not rescinded by the order.

The order directs HHS and the heads of other departments and agencies (e.g., U.S. Department of Labor, Treasury Department) to exercise all available authority and discretion to waive, defer, grant exemptions from, or delay the implementation of any provision of the ACA that would impose a fiscal burden on any 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. It should be noted that employers are not among those explicitly listed as requiring protection from regulatory burdens.

The order is broadly drafted and does not specify which provisions of the law should be targeted. However, to the extent that following the order would require revision of regulations issued through notice-and-comment rulemaking, the agencies will need to comply with the Administrative Procedures Act ("APA").

Under the APA, agencies cannot rescind existing regulations until they engage in a new notice-and-comment rulemaking process (including required public comment period and delayed effective dates) and observe other procedural requirements. In practical terms, the APA makes it difficult for an incoming President to overturn final regulations implemented by a predecessor. Regulations that haven't taken effect can be suspended while they are reviewed to determine if they conform to the new administration's agenda, or if modification or revocation is necessary. To that end, the President's chief of staff has instructed federal agencies to cease issuing new regulations and withdraw rules that have been sent to the Office of the Federal Register until they can be reviewed by the new agency heads.

The order is somewhat symbolic given the constraints imposed by the APA, yet it has some substantive effect. The directive gives HHS wide latitude when granting hardship exemptions from the individual mandate (it does not, however, waive the requirement for individuals to maintain minimum essential coverage). The order also signals to states that the federal government may be more receptive to granting Medicaid waivers, which afford states additional flexibility in designing and administering their programs. Another section of the order instructs the agency heads to work with states to encourage the sale of insurance across state lines, to the maximum extent permitted by law. Current law (the McCarran-Ferguson Act), protects insurance companies from interstate competition by permitting states to regulate health plans sold in their state, creating a patchwork of state insurance laws across the U.S.

From an employer perspective, employers with 50 or more full-time equivalent employees and sponsors of self-insured health plans are preparing to comply with the ACA's reporting requirements (Forms 1094 & 1095) over the next couple of months. They may be tempted to view the order as a sign that the Internal Revenue Service will not enforce the employer mandate or ACA reporting. However, 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. The IRS recently indicated in [FAQ guidance](#) that it intends to begin notifying employers of their potential liability for an employer shared responsibility payment for the 2015 calendar year "in early 2017".

Once President Trump's appointments to the regulatory agencies are seated we'll likely see new regulations proposed to ease the ACA's economic and administrative burdens, although the process will take some time. Also, now that President Trump has taken initial action on the ACA, it may ease the pressure on Congress to attempt an immediate repeal or find a replacement.



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