Healthcare Reform Takes Center Stage at the 2017 AMCNO/CMBA Medical Legal Summit

Gail Wilensky, PhD, delivered the keynote address, “The Future of the Affordable Care Act and Medicare Payment Reform,” at the 2017 Medical Legal Summit—an annual event co-sponsored by the Academy of Medicine of Cleveland & Northern Ohio (AMCNO), the Academy of Medicine Education Foundation, and the Cleveland Metropolitan Bar Association (CMBA). It was held March 24-25 at the CMBA Conference Center.

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Prior to Dr. Wilensky’s keynote presentation, opening remarks were provided by Dr. Robert E. Hobbs, AMCNO President and Summit Co-Chair, and Marlene Franklin, Esq., Associate General Counsel at MetroHealth Medical Center and Summit Co-Chair. The Health Care Law Update took place earlier in the afternoon, prior to the keynote presentation. Among the topics covered during that session were: “Safety Net Providers: Law and Public Policy,” and “Managing Risk in Employing Foreign Nationals: At the Crossroads of Health Care, Labor and Employment, and Immigration,” which was presented by Isabelle Bibet-Kalinyak, McDonald Hopkins LLC.

The American Health Care Act (AHCA)

GOP Efforts to Repeal and Replace the Affordable Care Act—What Can Healthcare Providers Anticipate Moving Forward?

By Elizabeth Sullivan, Esq., and Isabelle Bibet-Kalinyak, Esq., McDonald Hopkins LLC

On Monday, March 6, 2017, House Republicans released the American Health Care Act (AHCA)—the long-awaited plan to repeal and replace the Affordable Care Act (ACA). After a few weeks of intense activity, including passage of the legislation in the House Ways and Means Committee and the House Energy and Commerce Committee, the AHCA fell short of passage in the House. Republican proponents pulled the AHCA bill from consideration on Friday, March 24, 2017, due to concerns that sufficient support did not exist within the Republican Party to pass the bill. More uncertainty awaited the legislation in the Senate.

Even though the AHCA is currently tabled, the Trump administration and Republicans have not given up efforts to replace the ACA. In the past few weeks, meetings between the administration and various coalitions of Republicans have taken place, showing the continued interest in replacing the ACA.

Without new draft legislation, at this point, the real question is what the recent efforts to pass the AHCA tell us about future proposals for healthcare reform. Though the authors do not pretend to have a crystal ball, the dialogue surrounding the AHCA provides some insight into future legislation. While many things may change in subsequent efforts, several foundational elements appear to emerge and are likely to stick.

Initial Efforts to Repeal and Replace—The AHCA

When the ACA was enacted in March 2010, major themes included expansion of coverage, improving the efficiency and quality of health care, and lowering the overall cost of insurance. While the goal for Republicans over the past 7 years has been to repeal the ACA, the AHCA left much of the existing ACA themes in place. Untouched were a number of the most popular aspects of the ACA.
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relating to the group health plan coverage requirements, including but not limited to:
• Coverage of children up to age 26;
• Prohibition on insurers denying coverage based on pre-existing conditions;
• Cap on out-of-pocket expenses;
• Guaranteed availability and renewability of coverage;
• Prohibition on maximum lifetime and annual limits; and
• No discrimination based on disability, age, or sex.

The underlying reason the AHCA did not attempt to repeal more of the ACA stems from the process invoked by Republicans to pass the bill: budget reconciliation. The advantage of passing the AHCA legislation as a reconciliation bill is that only a simple Senate majority is required for passage. This is the same mechanism that was used to enact parts of the ACA in 2010. The downside to using budget reconciliation is that it must be revenue neutral, meaning that any reduction in federal revenue (i.e., tax cuts) must be offset by reduction in credits or spending. In addition, only legislation that is germane to the management of the budget is allowed to be passed using the fast-track method. This explains why the technical components of the ACA, in particular its provisions affecting the healthcare delivery system through quality initiatives and program integrity, were left unsathed in the AHCA. Overall, much of the AHCA focused on changes to the Medicaid program and the healthcare insurance market for individual consumers.

Aspects of the AHCA Likely to Reappear Changes to the State Medicaid Programs

Included in the AHCA was a “freezing” of the ACA’s Medicaid expansion program within 3 years. In 2020, the state Medicaid programs would be able to continue serving then-current enrollees, but would not be able to accept new applicants into the programs. In addition, the Medicaid’s funding model would have shifted from an open-ended commitment by the federal government to each state, to a set annual amount provided to each state, either in the form of a block grant or capped model related to the number of Medicaid beneficiaries. As negotiations within the Republican Party progressed, some of the accommodations intended to trigger additional Republican support included the addition of a work requirement for certain Medicaid beneficiaries and requiring Medicaid expansion beneficiaries to re-register every 6 months. Furthermore, the AHCA would have eliminated the requirement that Medicaid plans include the 10 “essential benefits” required by every plan under the ACA as follows:
• Ambulatory patient services;
• Emergency services;
• Hospitalization;
• Maternity and newborn care;
• Mental health and substance use disorder services, including behavioral health treatment;
• Prescription drugs;
• Rehabilitative services and devices;
• Laboratory services;
• Preventive and wellness services and chronic disease management; and
• Pediatric services, including oral and vision care.

Because of the interest in program savings, it is likely that many of the aspects of Medicaid reform contained in the AHCA and discussed during related negotiations will reappear in the future. In particular, the concept of the federal government providing states with a fixed amount of funding for the Medicaid program each year has been a constant of prior Republican repeal-and-replace efforts and is likely to be a feature of any future proposals. Consequently, it seems probable that future proposals to reduce Medicaid spending will result in a reduction of the total number of beneficiaries. Providers and facilities that routinely treat the uninsured and Medicaid patients are likely to be the first to feel the impact of such reduced coverage.

Individual Healthcare Insurance Market

The AHCA also proposed a number of changes to the individual healthcare insurance market. Under the AHCA, the ACA individual penalty for lack of healthcare coverage would be replaced by continuous coverage incentives that would make health insurance more expensive for individuals who lost coverage and later decided to reapply for insurance. Instead of premium subsidies based on income, the AHCA proposed tax credits based on age. The AHCA would have also permitted insurers to implement maximum risk ratios of 5 to 1 rather than 3 to 1 as required by the ACA.

During the negotiation of the AHCA, one of the issues raised by House members on the fence or against the bill was the fact that the AHCA would not cause premiums to fall for individuals purchasing insurance on the open market and that premiums would likely increase, at least in the short term. Another proposal was the elimination of the requirement that all health plans include the 10 essential health benefits in exchange for more reasonably priced coverage. Critics, however, worried that health plans would be stripped by insurers without the desired impact of significant reduction in premiums if the essential health benefits were no longer required.

Down but not Out

Repealing and replacing the ACA remains a top priority of the new administration and the Republican Party. As recently as early April, Vice President Mike Pence met with House Speaker Paul Ryan and other House Republicans to discuss a path forward. While the elimination of the 10 essential health benefits for all health plans was reportedly off the table, the concept of a waiver program that would permit states to eliminate the requirement that insurers comply with the ACA’s community rating requirements was purportedly discussed. Such a change could negatively impact high-risk individuals and those with pre-existing conditions.

Most recently, on April 6, 2017, an amendment to the AHCA was submitted to the House Rules Committee, reintroducing the AHCA for consideration by the House, together with a new amendment that created a $15 billion fund establishing an invisible risk-sharing program that would help states subsidize claims from high-risk individuals. Critics responded that the program would not have a meaningful impact and individuals would still feel the effects of the other contemplated changes, including the high propensity for increased premiums based on risk or age.

Efforts to repeal and replace the ACA will expectedly continue along partisan lines. Such efforts will be supported by Health and Human Services Secretary Tom Price, MD, the former Republican House Representative who issued his own repeal and replace plan in 2015 and reportedly consulted with House Speaker Ryan in assembling the AHCA. However, the lack of alignment among Republican critics of the AHCA presents unique challenges for the White House and congressional Republicans to find a way forward. In crafting and embracing more common ground with moderate critics, the White House and the Republicans already on board risk alienating the more conservative base and vice versa. These internal divisions make predicting which individual coverage elements will survive very difficult. While moderate Republicans and Democrats worry about individuals losing coverage, conservative Republicans remain concerned that the AHCA does not go far enough to curb costs. Amidst the dissentions, one constant remains: Supporters of the AHCA appear ready to continue to fight and vow to repeal the ACA. In the coming days, weeks, and perhaps months, we will need to continue to monitor the progress of repeal-and-replace legislation. While some clues exist, the final shape of the next healthcare reform legislation is anyone’s guess.

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