

HALL RENDER'S THIS WEEK IN WASHINGTON - NOVEMBER 11, 2016

Election Threatens Future of the Affordable Care Act

On November 8, Americans elected Donald J. Trump the 45th President of the United States and in doing so put the future of the Affordable Care Act ("ACA") in serious jeopardy. Republicans retained control of the House of Representatives and held on to what is expected to be a 52-48 majority in the Senate. With control of the legislative and executive branches of government, Republicans are now poised to fulfill their longstanding promise to repeal President Obama's signature legislative achievement. However, repealing any portion of the ACA through legislation will take time, and repeal of its most popular provisions is very unlikely.

While the details of a Republican replacement plan are not yet known, the manner by which they can repeal the law's most important provisions is already clear. Although the GOP still controls the Senate, it did not win a 60-seat majority. That means Democrats can prevent repeal legislation from moving through that body by using a filibuster. However, Republicans can overcome a filibuster by using a parliamentary procedure known as budget reconciliation, which requires a simple majority vote, to repeal those portions of the ACA that have a direct financial effect on the United States Government. Ironically, budget reconciliation was used by Democrats to pass the ACA after they lost their 60-seat majority following the death of Sen. Edward Kennedy (D-MA) in 2009.

In order to use budget reconciliation as the legislative vehicle for ACA repeal, Republicans must first pass a budget resolution through the House and Senate. This will require Republicans to agree on the contents of a resolution, which will not be easy given the nature of the conservative House Freedom Caucus to resist any proposal that increases government spending. Lawmakers will then need to put the resolution into legislative form, hold committee hearings and pass the resolution through each body. This will require deal-making and take significant time and effort. Furthermore, Republicans are aware that millions of people now rely on the ACA for their health care coverage. They are undoubtedly aware that it would severely damage their political future to pass repeal legislation without settling on a replacement plan first. Therefore, the odds of repeal legislation being signed into law in the first year of a Trump presidency are low.

However, there are many steps President-Elect Trump can take to cripple the ACA almost immediately upon reaching office. For example, he could instruct the Department of Justice to withdraw from any lawsuit challenging the ACA, such as those regarding the contraception mandate or the House Republican claim that the administration spent money on the ACA that wasn't appropriated. President-Elect Trump could also cut off funding for outreach and assistance to deter enrollment, require enrollees who underestimated their annual income to return all excess tax credits or cut off subsidies to insurance companies designed to help them through the ACA's early years. Additionally, the incoming administration could decide to exempt more people from the individual mandate or grant liberal Section 1332 innovation waivers to essentially let states opt out of Medicaid expansion altogether. The coming leadership changes at HHS and CMS alone will cause turmoil, and new leaders dedicated to gutting the ACA will cause a mass departure of those who joined these entities to make the ACA work. Their replacements could easily reverse much of the agency guidance issued for the ACA without going through the more difficult rulemaking process.

As for which provisions of the ACA Republicans will try to repeal through budget reconciliation, that can be determined by looking at their most recent repeal attempt in 2015. In that instance, Republicans used budget reconciliation to move a repeal package that eliminated insurance subsidies, the individual and employer mandates, tax credits, Medicaid expansion, the medical device tax and the "Cadillac Tax" on employer health plans. The measure did not repeal some of the most popular ACA provisions, such as the ban on pre-existing condition exclusion or allowing children to remain on their parents health insurance until they are 26, nor did it interrupt the move from fee-for-service towards value-based payments. Furthermore, since Republicans didn't have a replacement plan, their 2015 legislation delayed the end of insurance premium tax credits for three years. Thus, any future replacement plan is expected to contain a similar provision to allow for the transition to a new program without the loss of coverage.

At this point, details on what will be used to replace the ACA are limited. According to President-Elect Trump's [transition website](#), the incoming administration will seek to replace the ACA with a program that includes Health Savings Accounts and "returns the historic role in regulating health care to the States." The proposal also includes the use of high-risk pools for people with expensive medical conditions, FDA

reform, "protecting individual conscience in health care," advancing researching and development in health care, modernizing Medicare and maximizing state flexibility on Medicaid, which could come in the form of block grants that have been historically opposed by Democrats or per beneficiary caps that have received some bipartisan support in the past.

Additional information can be gathered by analyzing past Republican health care proposals. In June, House Speaker Paul Ryan (R-WI) issued a **white paper** that also proposes replacing the ACA with a program that includes tax deductions and subsidies for HSAs. Lawmakers could look to expansion of the HSA-based Healthy Indiana Plan (HIP 2.0) implemented by Vice President-Elect Mike Pence under a waiver from CMS. Other ideas include the use of refundable tax credits to purchase insurance, preserving employer-sponsored plans, expanding opportunities for small business pooling, allowing the purchase of insurance across state lines and medical malpractice reform. To date, none of the Republican proposals in Washington have included insurance exchanges like those found in the ACA.

All in all, the election has thrown the future of health care in America into total uncertainty. Providers that have come to rely on the ACA are now facing wholesale changes that could result in even more payment reductions and an increase in uncompensated care. Lawmakers are loath to put the burden of health care reform on beneficiaries and will almost certainly seek to shift any costs to providers and insurance companies. While Republicans will not be able to immediately repeal and replace the ACA, they are now in sufficient control of the federal government to fulfill their promise to destroy President Obama's landmark legislative achievement. A whole new world is coming.

Next Week in Congress

The House and Senate return on Monday to begin the lame duck session that is expected to run through the middle of December. Lawmakers will decide whether to attempt passage of an omnibus bill funding the government for fiscal year 2017 or a continuing resolution to keep the government running through March or April, as current government funding expires on December 9. The Senate is also scheduled attempt to take up the 21st Century Cures legislation and a comprehensive mental health bill.

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