

January 20, 2017 Presidential Executive Order Regarding the Affordable Care Act

Executive Order Cannot Repeal the Affordable Care Act

Executive Order Does Not Impact Any Key Provisions of the Law Though It May Signal Future Actions to Impact Coverage

On January 20, 2017, President Trump issued an Executive Order titled "Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal." This Executive Order does not and cannot repeal the Affordable Care Act ("ACA") and has no direct or immediate impact on any of the components of the Affordable Care Act and New York law that provide key consumer protections to New Yorkers. However, the issuance of the Executive Order signals that the President may support efforts to repeal key aspects of the ACA and regulations promulgated under the act.

The Executive Order includes three directives to federal agencies, including Health and Human Services:

1. To exercise all authority and discretion available to them to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the Affordable Care Act 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.
2. To exercise all authority and discretion available to them to provide greater flexibility to States and cooperate with them in implementing healthcare programs.
3. To encourage the development of a free and open market in interstate commerce for the offering of healthcare services and health insurance, with the goal of achieving and preserving maximum options for patients and consumers.

Aside from signaling potential future action, the consequences of the Executive Order itself are unclear as the directives in the Executive Order are vague and in parts internally inconsistent. For example, the first directive requires that federal administrative agencies avoid imposing a fiscal burden on the states or on individuals, families, providers or insurers. Yet, any action to repeal or change the Affordable Care Act would impose significant fiscal burdens on several, if not all, of these groups. Moreover, any shifting of health care costs, as a general matter, would result in one group paying more and another group paying less. As an example, withdrawing funding to states for the expansion of Medicaid would result in either the state, and therefore taxpayers, health care providers or consumers shouldering the greater burden of health care costs. Premiums for health insurance are based on healthcare costs, and administrative expenses and profits sought by health insurance companies.

Importantly, the directives included in the Executive Order appear to be messages only, as an Executive Order **cannot** overturn existing laws passed by Congress or a state legislature. The consumer protections and duties and obligations imposed on states and insurers by the Affordable Care Act are set forth in statutes and regulations that cannot be repealed or undone by an Executive Order. In particular, the overall framework established by the Affordable Care Act including the balance between federal mandates and state discretion cannot be altered

without legislation amending or repealing the Affordable Care Act or, as to certain provisions, budget legislation that withdraws funding for any provision of the law requiring federal sources of revenue. Although regulations can be amended or repealed by an administrative agency, the process of amending or repealing a regulation is subject to the same rule-making procedures as the issuance of a new regulation. That said, the new administration may propose legislation to significantly change the ACA, and the new HHS Secretary may seek to amend or repeal existing regulations promulgated under the ACA.

Therefore, at the present time, the Executive Order has no legal effect on any of the key provisions of the Affordable Care Act for New Yorkers, which include:

1. Establishment of a basic set of Essential Health Benefits that must be included in every health care policy.
2. Requirement of coverage of preventive care services with no cost-sharing.
3. Ban on exclusion of coverage for preexisting conditions.
4. Requirement that dependents continue to be covered until age 26.
5. Prohibition against annual and lifetime limits.
6. Establishment of maximum out-of-pocket limits that restrict the amount of cost-sharing that may be imposed by insurers on policyholders.
7. Requirement of coverage for out-of-network emergency services.
8. Requirement that every insurer offer coverage to every applicant, ending insurer practices of denying coverage for the sick.
9. Establishment of minimum standards requiring the same rate for all policyholders in individual and small group plans, regardless of medical condition.
10. Establishment of Health Insurance Exchanges including the New York State of Health.
11. Establishment of a single risk pool for each of the individual and small group markets.
12. Creation of uniform tiers of coverage (platinum, gold, silver and bronze) so that consumers can effectively comparison shop.
13. Increase in Medicaid eligibility to include more low-income individuals and families.
14. Availability of tax credits to individuals and small businesses to offset the cost (i.e. premiums) of health insurance policies.
15. Availability of subsidies to limit the impact of cost-sharing imposed on qualifying individuals and families.
16. Requirement that employers with more than 50 employees offer quality health insurance coverage to all their employees.

It remains to be seen whether Congress will pass legislation to “replace” the ACA, an effort that under existing Senate rules requires 60 votes. It also remains to be seen what legislation the President will support.

With respect to regulations, the component of the Affordable Care Act that is most susceptible to change as a result of the Executive Order is the current federal risk adjustment program, which

provides for the reallocation of premiums among health insurers depending on the healthiness of their populations of insureds. The risk adjustment program, however, has no impact on any of the sixteen key provisions identified above. Rather, the risk adjustment program only impacts insurers and provides a series of rules under which insurers pay into or receive distributions from a pool in order to transfer funds from health insurance plans with lower-risk enrollees to plans with higher-risk enrollees. While the risk adjustment program could impact a particular insurer's request for premium increases in a subsequent year, in New York, the rates for 2017 have already been established.

The Department of Financial Services (DFS) will continue to be vigilant and report on relevant proposals regarding the Affordable Care Act that may impact New York. DFS remains committed to ensuring that all New Yorkers have quality, affordable healthcare and that consumers are fully protected under New York law.