

January 24, 2017

## Trump Issues Executive Order Regarding the ACA

On his first day in office on Friday, President Trump took action showing his intention to “minimize the unwarranted economic and regulatory burdens of the Affordable Care Act (ACA)” by issuing an executive order instructing applicable regulatory agencies “*to the maximum extent permitted by law...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 [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.*” The order itself is somewhat symbolic because it does not (1) specifically include employers in the list; (2) explain which provisions of the ACA should be targeted or affected; and (3) actually change any current rules or regulations under the ACA. In fact, the order expressly states that all agencies/ departments must continue to follow the notice and comment process required by law under the Administrative Procedures Act if complying with the executive order would require revisions to existing ACA regulations.

### Timing Issues and Possible Impact on Employers

Many of the Administration’s nominations/appointments to lead the various agencies have either not yet been confirmed or are not yet in place. It will also take some time to plan, draft, and release any official agency guidance because of the formalities that must be followed under the Administrative Procedures Act. Although the regulatory

agencies cannot repeal aspects of the ACA, they could make significant changes through various methods, such as issuing enforcement delays and changing current agency interpretation of various aspects of the law.

A good example is with the ACA’s definition of a “full-time employee.” The IRS cannot change the fact that a full-time employee is defined in the law as an employee working an average of 30 hours per week. That provision is contained in the statute itself. But the IRS could change current regulatory guidance such as the use of a look-back measurement period to define the 30 hours. The look-back measurement period rules were created by the IRS under separately released regulations and are not part of the statute itself.

Employers may be tempted to view the executive order as an indication that none of the ACA provisions that contain a fine or tax penalty will be enforced. However, employers should not count on the executive order to provide **immediate** relief for liabilities tied with key ACA provisions already in effect, e.g., the Pay or Play rules and the reporting requirements. The IRS recently indicated that they expect to begin sending Pay or Play penalty notices in early 2017 (based on information reported on Forms 1094 and 1095 in early 2016 for the 2015 calendar year).

### Summary

President Trump’s executive order provides a clear signal that the new Administration plans to make changes to the ACA through regulatory action as quickly as possible, even while Congress works toward drafting a repeal and

replacement plan. However, because the order cannot be relied upon to provide immediate regulatory relief, we strongly recommend that employers subject to the ACA continue to offer compliant coverage to at least 95% of their full-time employee workforce and complete the reporting requirements as originally scheduled. Once the Administration's appointments at the key federal agencies are in place, employers should pay close attention to what will likely be a steady stream of agency guidance and enforcement delays that could significantly impact portions of the ACA that affect employer-sponsored plans. We will keep you posted as key developments occur in the coming days, weeks and/or months.

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