

President Biden's Executive Orders: Impact on Employee Benefits and Healthcare

By Morris Hawk

In the opening days of his administration, President Biden has signed a flurry of Executive Orders impacting multiple sectors of the U.S. economy. This article summarizes the Orders that impact employee benefits and healthcare and what those Orders may portend for future regulatory action.

COVID-19 and Group Health Plans. As part of President Biden's efforts to address the COVID-19 pandemic, he has authorized the White House COVID-19 Response Team to issue any necessary clarifications related to the obligation of group health plans and health insurance issuers to provide COVID-19 testing. Similarly, he has directed the Department of Health and Human Services ("HHS") to evaluate group health and health insurance issuers and take any available steps to promote insurance coverage for safe and effective COVID-19 treatments and clinical care. President Biden has also authorized targeted surge assistance to critical care and long-term care facilities and targeted research efforts for rural hospitals and historically underrepresented populations.

Special Enrollment Period for ACA. President Biden has authorized the Department of Health and Human Services ("HHS") to institute a special enrollment period for those wishing to enroll in an Affordable Care Act (ACA) plan through HealthCare.gov. The enrollment period began on February 15, 2021 and will continue through May 15, 2021. The goal of this Executive Order (the "ACA Order") is to provide uninsured and underinsured Americans, particularly those impacted by the COVID-19 pandemic and the accompanying economic downturn, with another opportunity to obtain health insurance. The HHS has rolled out a \$50 million advertising and outreach effort to encourage enrollment during this period.

Review of Agency Rules and Policies. The ACA Order also instructs the Departments of Treasury, Labor, and HHS to identify and review any existing agency policies or practices that: 1) undermine coverage for those with pre-existing conditions; 2) reduce coverage under Medicaid or the ACA; 3) undermine the Health Insurance Marketplace; 4) present barriers to those attempting to access Medicaid or ACA coverage; or 5) reduce the affordability of coverage or financial assistance for coverage. Although the Order does not expressly identify any such policies for suspension or rescission, we anticipate that the broad language of this mandate will spur a flurry of agency activity broadly designed to expand coverage under Medicaid and the ACA, including expanding the income threshold for coverage through rule-making and potentially rolling back Medicaid work requirement waivers.

Health Reimbursement Arrangements, Association Health Plans, and Short-Term Limited Duration Insurance. Significantly, the ACA Order expressly revokes former President Trump's Executive Order 13813, which authorized rule-making that significantly expanded the use of

Association Health Plans (“AHPs”), Short-Term Limited Duration Insurance (“STLDIs”), and Health Reimbursement Arrangements (“HRAs”). Practically speaking, the Trump-era rules expanding AHPs and STLDIs were effectively halted by court injunctions. However, the HRA rule – which, among other things, provided small employers with the option to provide individual coverage HRAs for employees, was implemented. Thus, the language of the Order raises the question of whether the Biden Administration will determine that the expanded use of HRAs “undermines” the ACA. We are hopeful that the Biden administration will recognize the benefits of the HRA rule for small employers.

Supply Chains and Healthcare. President Biden has also issued a series of Executive Orders authorizing the HHS to 1) secure supply chains for critical items needed to combat COVID-19, including personal protective equipment; 2) report within 100 days on risks in the supply chain for pharmaceuticals and active pharmaceutical ingredients; and 3) report within one year on risks in the supply chain for public health generally and the biological preparedness industrial base. These Orders emphasize the need for American sources for these critical needs. Whether these reports will recommend or require “American-only” sourcing for PPE or certain pharmaceuticals (or mandate a certain percentage of American sourcing) remains to be seen. Obviously, any such mandate could also impact group health plans and health insurance issuers.

Roetzel will continue to monitor developments in this area. For more information and insight on this matter, please contact one of the listed Roetzel attorneys.

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