

Washington Business Health Update

From the National Business Group on Health

Vol. XXI, No. 2 January 28, 2011

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➤ **PRESIDENT OPEN TO MODEST CHANGES TO THE HEALTH CARE LAW**

In his State of the Union Address on Tuesday, the President identified three health care issues that he was willing to consider:

- Medical malpractice reform to rein in frivolous lawsuits;
- Repealing a provision requiring businesses to file IRS 1099 reports for every transaction with vendors of \$600 or more; and
- Additional Medicare and Medicaid reductions beyond the \$500 billion already in the health care law.

The President also made it clear that that he would not accept major changes such as the prohibition on pre-existing condition exclusions, the expansion of coverage to adult dependents or a rollback of the additional federal funds for seniors' prescription drug coverage under Medicare Part D.

In the Republican response, the House Budget Committee Chair, Representative Paul Ryan (R-WI), stated that House Republicans would not stop at repealing the 1099 requirement and suggested that the President start with the health care law when the Administration reviews the regulatory obstacles facing American businesses.

Recently, Representatives Phil Gingrey (R-GA), a physician, David Scott (D-GA) and House Judiciary Chair Lamar Smith (R-TX) introduced a health care legal reform bill that would:

- Cap noneconomic damages at \$250,000;
- Limit punitive damages to the greater of \$250,000 or twice economic damages in medical malpractice awards, except when state laws specify a specific amount for compensatory or punitive damages;
- Prohibit punitive damages for medical devices approved by the Food and Drug Administration (FDA);
- Allow for periodic payments for damages exceeding \$50,000;
- Establish a 3 year time limit following the date of injuries or 1 year after claimants discover injuries when they would have to file, with certain exemptions for fraud,

intentional concealment, foreign bodies left in patients or until minors' 8th birthdays; and

- Limit attorneys' contingent fees in medical malpractice cases on a sliding scale ranging from a maximum of 40% on the first \$50,000 to 15% on awards of more than \$600,000.

Senate Majority Leader Harry Reid (D-NV), Finance Committee Chair Senator Max Baucus (D-MT), Senator Mike Johanns (R-NE) and Representative Dan Lundgren (R-CA) have introduced bills to repeal the 1099 reporting requirement.

IMPACT ON EMPLOYERS: Comprehensive changes in the health care legal system will reduce the amount of employer dollars diverted from paying for needed, quality care toward frivolous lawsuits and defensive medicine (estimated to account for 20-30% of all medical costs) and litigation costs.

Excessive litigation and high medical malpractice insurance rates also accounts for some of the decline in access as physicians in high-risk specialties stop practicing.

Medicare should quickly move away from fee-for-service to payment based on performance and improved health outcomes to accelerate more effective care delivery and improve the program's fiscal sustainability.

IMPACT ON EMPLOYEES: With comprehensive health care legal reform, employees could expect improved access to and reduced out-of-pocket costs for health care, especially for high-risk services. They would also receive fewer unnecessary tests, scans and procedures as defensive medicine declines.

Employees could expect improved access to emergency rooms that have closed or reduced hours and ob-gyn services in areas where ob-gyns have reduced their practices or stopped practicing altogether because of stratospheric increases in malpractice insurance rates. Although those successfully suing for malpractice would receive smaller total damage awards, they would receive a greater percentage of the amount, as attorneys' fees would be limited.

If Medicare delays improving the way it pays for health care, employees do not reap the benefits of a more effective and efficient health care system.

OUTLOOK: *Congress will likely pass and the President will sign on to removing the 1099 requirement.*

The House will likely pass medical liability reform in the next few months, but it will face opposition in the Senate. The White House may favor a limited approach addressing physician malpractice insurance, which will only be of limited help in solving the defensive medicine and frivolous lawsuit problems.

With divided government, we expect Congress to consider more regulatory flexibility; delays of some of the Affordable Care Act's provisions; defunding implementation of some provisions, reductions or eliminations of some fees or taxes; and more investigations and oversight of implementation of the law.

House conservatives have already proposed additional substantial cuts to Medicare and Medicaid, but the Senate is unlikely to pass them.

BACKGROUND: The House Republicans included comprehensive medical liability reforms in their alternative to the current health care law.

A 2009 Congressional Budget Office (CBO) [analysis](#) found that health care legal reform could save up to \$54 billion over 10 years.

The Patient Protection and Affordable Care Act (Affordable Care Act) authorizes grants to States to test alternatives to civil tort litigation, recommended by a 9-person panel appointed by the Government Accountability Office (GAO) of patient advocates, health care providers, attorneys with expertise representing patients and providers, medical malpractice insurers, state officials and patient safety experts.

President Bush proposed reforming the medical liability system through his administration and in his last State of the Union address. During the last 12 years, House Republicans passed legislation 8 times to restrict medical malpractice lawsuits and cap jury awards but were unable to pass the bill in the Senate

In 2003, Texas passed a sweeping tort reform bill that capped “non-economic damages” at \$250,000 per defendant, up to \$750,000 per incident. California passed a \$250,000 cap on “noneconomic damages” in medical liability lawsuits in 1975.

The President previously mentioned his support for repealing the 1099 reporting requirement, a tax provision unrelated to health care though it is a nuisance for business, following the results of the recent elections in November.

Congress, with the exception of 2002, has passed legislation each year to either freeze or reduce the amount of the Medicare physician payment cuts that Clinton-era 1997 budget legislation required if Medicare expenditures increased too much.

NATIONAL BUSINESS GROUP ON HEALTH VIEW ON THESE ISSUES: The Business Group supports reforms to the health care legal system that would improve patient safety and eliminate frivolous lawsuits—caps on non-economic damages in malpractice lawsuits; a 3 year statute of limitations after the date of injury or one year after injury discovery; restrictions on attorneys’ contingency fees; limits on attorney fees based on award value; federal jurisdiction for health care litigation and strengthened criteria for the expert witness rule to ensure accurate medical opinions.

Link to the Business Group’s health care legal reform position statement:

<http://businessgrouphealth.org/pdfs/National%20Business%20Group%20on%20Health%20Position%20Statement%20on%20Health%20Care%20Legal%20Reform.pdf>

➤ **REPUBLICANS HOLD HOUSE HEARINGS ON HEALTH CARE LAW’S COSTS AND IMPACT ON JOBS**

This week, House Republicans focused hearings on the economic costs of the new health care law and its impact on job creation.

The House Ways and Means Committee heard testimony from employers concerned about the health care law's impact on their businesses, including:

- A printing company with 45 employees that cannot keep the health care plan that employees like because of the law; and
- A restaurant owner who stated that providing "qualifying coverage" under the law would likely cost \$7,000 per employee or more, which is above his ability to pay.

At the House Budget Committee hearing, the Centers for Medicare and Medicaid Services' (CMS) Actuary stated that:

- The law is unlikely to reduce overall medical costs because the newly insured under the Medicaid expansion and those receiving tax credits in the exchanges will also be taking advantage of their new access to medical services and will drive up utilization;
- More than 7 million Medicare recipients in private Medicare Advantage plans will eventually have to find other coverage because of reimbursements cuts to the plans—reducing enrollment by about half; and
- The federal government double-counts some of the health care law's Medicare taxes as paying for health reform and for Medicare.

Adding more support to the view that the law will not reduce health care spending, the CBO released a new [report](#) this week that estimated that:

- Federal spending on government health care programs will increase by more than 200% over the next 10 years from \$810 billion in 2010, or 5.8% of gross domestic product (GDP), to \$1.8 trillion in 2021, or 7.4% of GDP;
- Medicare spending will increase by \$250 billion over 10 years unless Congress agrees on a permanent change in the way it reimburses physicians; and
- The Federal government will spend \$94 billion over the next 10 years to states for operating the state insurance exchanges and to provide tax credits for over 7 million people in 2014 and up to 18 million people in 2021 to purchase coverage in the state exchanges.

IMPACT ON EMPLOYERS: In the near term, the Congressional hearings will have little impact on employer plans. Employers are implementing provisions of the law that take effect now and planning for future provisions. However, to the extent the hearings address concerns that employers have about provisions in the law, including its impact on costs and plan administration, employers could see positive changes in the future.

Higher health care spending by employers and by the federal government contributes significantly to stagnating wages, makes goods and services more expensive, makes it increasingly difficult for employers to provide affordable health care benefits to their employees and hurts American employers' global economic competitiveness.

IMPACT ON EMPLOYEES: Similarly, the Congressional hearings will have little near term impact on employees.

Rapidly rising health care spending contributes significantly to stagnating wages, makes it increasingly difficult for employees to pay for their cost sharing and for people without employer-sponsored coverage to purchase insurance on their own, and leaves employees with less money for other goods and services.

OUTLOOK: House Republicans will hold additional investigations and oversight related to the implementation of the law. Congress will enact minor changes to the law.

BACKGROUND: House Republican Committee leaders promised during the last elections that they would hold hearings that to require Administration officials to defend the health care law. They also will try to withhold funding for as many provisions of the health care law as possible, beginning with stop-gap funding for the federal government that expires in March.

NATIONAL BUSINESS GROUP ON HEALTH VIEW AND ACTION ON THESE ISSUES: The National Business Group on Health submitted written testimony to the House Ways and Means Committee that uncertainty or the lack of clarification regarding “the rules of the road” to implement the law has led many employers to hold off on hiring new employees and that the law does not address their chief concerns to radically change the way we pay for and deliver care.

Link to the Business Group’s testimony:

<http://www.businessgrouphealth.org/pdfs/Testimony%20of%20NBGH%20Before%20House%20Ways%20and%20Means%20Committee%20012611.pdf>

If you would like more details on these or other issues or would like a phone briefing on legislation, or want to express concerns about specific issues, please contact Steven Wojcik, Vice President, Public Policy at wojcik@businessgrouphealth.org or 202-558-3012. **Also, as part of our “Ask a Benefits Question” service, we are happy to respond within 24 hours to any health benefits question on policy, regulations or legislation.**

This material is provided for information purposes only and is not a substitute for legal advice.

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