

Washington Business Health Update

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➤ **SENATE VOTE TO REPEAL THE HEALTH CARE LAW FAILS**

Last week, in another mainly symbolic vote, Senate Republicans tried to pass an amendment identical to the House-passed bill to repeal the health care law. Senate Minority Leader Mitch McConnell (R-KY) forced the vote which was defeated after the recent federal court ruling in Florida that the individual mandate is unconstitutional.

The Senate did, however, pass an amendment repealing the health care law's requirement that businesses submit a 1099 form to the IRS for each vendor to whom they pay more than \$600 each year.

In other action on the health care law, Senators John Barrasso (R-WY) and Lindsey Graham (R-SC) also introduced a bill that would allow states to opt-out of the health care law's expansion of Medicaid, the individual mandate, any of the benefit mandates for the individual and small group markets and the employer free rider assessment.

In addition, in recent letters, Republican leaders of the House Energy and Commerce Committee asked the Department of Health and Human Services (HHS) to provide information about a [\\$1 billion fund](#) to implement the health care law and the \$400 million in funding for [comparative effectiveness research](#) provided in the 2009 economic stimulus law. Energy and Commerce Ranking Member Henry Waxman (D-CA) criticized the letters as attempts to hinder HHS' efforts to implement the law.

<p>IMPACT ON EMPLOYERS AND EMPLOYEES: In the near term, the Senate vote and the other bills on the health care law will have <i>little impact</i> on employer plans and employees. Employers are implementing provisions of the law that take effect now and planning for future provisions. However, the Senate vote does raise additional uncertainty about whether the law will change in the future and the impact these potential changes will have on their health care benefits.</p>
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OUTLOOK: *Senate Minority Leader McConnell promised to offer repeated amendments in the future to strike specific provisions, such as the individual mandate, and to cut funds necessary to implement the law. Senate Democrats*

plan to counter with amendments supporting the law's more popular provisions, including the prohibition on pre-existing condition exclusion clauses, etc.

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

With divided government, we expect Congress to consider more flexibility and exemptions from certain provisions (individual mandate, employer penalties and possibly exchanges); delays of some of the health care law's provisions; defunding implementation of some provisions, reductions or eliminations of some fees or taxes; and more investigations and oversight of implementation.

BACKGROUND: 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.

Employers have already begun to implement a number of the early provisions required under the health care law, including accounting for retiree drug subsidy (RDS) taxes; deciding whether or not plans should maintain their grandfathered status; eliminating lifetime limits; applying for the early retiree reinsurance program; adding adult dependent coverage; implementing health account changes for over-the-counter drugs; and providing break times and accommodations for nursing mothers. The federal government has also begun to implement a number of the health care payment and delivery reforms. The health care law's big changes, the free rider assessment (employer mandate), the exchanges, tax credits, and the "Cadillac" tax don't come on line for several years. Thus, Congress has time and a Presidential election before it may deal with the big provisions. In March 2010, Congress passed and the President signed into law the Patient Protection and Affordable Care Act and related laws.

NATIONAL BUSINESS GROUP ON HEALTH'S VIEW AND ACTION ON THIS ISSUE:

The Business Group has met with regulators, submitted comments, and will continue to submit comments on the key employer provisions and health care payment and delivery changes to increase employer flexibility and increase the effectiveness and efficiency of health care services.

➤ **SENATORS RE-INTRODUCE BILL TO PROHIBIT DEALS THAT POSTPONE MARKET ENTRY OF GENERIC DRUGS**

Senators Herb Kohl (D-MI) and Charles Grassley (R-IA) re-introduced a bill that would make it illegal for brand and generic pharmaceutical manufacturers to make deals that delay the market entry of generic drugs. Under the bill, companies could receive exceptions if they can prove to the Federal Trade Commission (FTC) "by clear and convincing evidence" that the pro-competitive benefits to consumers of the agreements outweigh the costs (anticompetitive effects, lack of available generics, higher prices, etc.).

IMPACT ON EMPLOYERS AND EMPLOYEES: Employer plans and employees would greatly benefit from earlier availability of lower cost generics. Specifically, employees would have reduced out-of-pocket expenses.

OUTLOOK: The bill faces strong opposition from Republican and Democratic Senators, House Members and the pharmaceutical industry.

BACKGROUND: In July, the Senate removed the same provision that the House had attached to the war supplemental spending bill.

The House's original health care "reform" bill also included language banning "pay for delay" deals.

An FTC [study](#) found that such agreements delayed market entry of generic drugs an average of 17 months (approximately 1.5 years) and that prohibiting such agreements could save American consumers \$35 billion over 10 years.

The Congressional Budget Office (CBO) [estimates](#) that the federal government would save more than \$2.7 billion over 10 years by ending "pay to delay" deals in lower drug costs for Medicare, Medicaid, military and veterans' health programs.

A number of brand and generic drug companies have faced steep fines for failing to inform the FTC of agreements to delay generic drug entry into the market. Since 2005, the FTC has sought to use antitrust enforcement to stop "pay to delay" payments. However, courts have treated such agreements leniently and the FTC has had little support from the Justice Department.

"Pay to delay" deals arise because the original law that created a pathway for the Food and Drug Administration (FDA) to approve generic medications, the Hatch-Waxman law, grants the first to market generic manufacturer a six month market exclusivity period, which some companies trade away to the brand manufacturers for a price.

NATIONAL BUSINESS GROUP ON HEALTH VIEW AND ACTION ON THIS ISSUE:

The Business Group supports eliminating the barriers to timely access to affordable, clinically effective generic drugs and fostering a more competitive prescription drug market while at the same time encouraging innovation. We believe that "pay to delay" agreements go against the market rules agreed to in the Hatch-Waxman legislation and the spirit of competition. As a result, patients, employers, insurers and the government pay a heavy price in dollars and some people may forego needed medications.

The Business Group sent a support letter for Senators' Kohl and Grassley's bill to prohibit "pay to delay" deals.

Link to the letter:

<http://www.businessgrouphealth.org/pdfs/020311%20Support%20Letter%20for%20Kohl-Grassley%20Bill%20to%20Prohibit%20Pay%20to%20Delay%20Deals.pdf>

➤ **SENATE JUDICIARY COMMITTEE HOLDS HEARINGS ON CONSTITUTIONALITY OF THE INDIVIDUAL MANDATE**

At a recent hearing, the Senate Judiciary Committee heard contradictory opinions from lawyers on whether or not the individual mandate in the health care law is constitutional.

- One view holds that since everyone will eventually need health care, the failure to buy health insurance is “undoubtedly commerce” and therefore subject to regulation by Congress under the Commerce Clause of the Constitution.
- Another view holds that since the health care law requires every American to enter into a contractual relationship with a private company, it is unconstitutional and fundamentally changes the relationship of the people to the federal government.
- Another view holds that the individual mandate is “unprecedented” and extends the reach of the government into regulating “economic inactivity,” namely when people chose not to purchase health coverage.

In judicial developments on the issue, Virginia Attorney General Ken Cuccinelli (R) recently asked the U.S. Supreme Court to expedite a review a Virginia federal district court judge's ruling that the health reform law's individual mandate is unconstitutional, bypassing the federal appellate court, which has not yet heard the case. Last week, Senator Bill Nelson (D-FL) introduced a bill asking the Supreme Court to bypass the appeals court process to consider the constitutionality of the individual mandate.

In response to the recent, similar, ruling in the case brought by Florida and 25 other states, Florida Governor Rick Scott (R) stated that he would delay his state's implementation of the health care law. However, most states remain reluctant to change their implementation plans.

IMPACT ON EMPLOYERS AND EMPLOYEES: For private payers, like employer plans, the individual mandate promises to reduce the number of uninsured and the future potential to shift costs associated with care for the uninsured onto private payers, including employer plans and their employees. The individual mandate would also improve the functioning of the insurance market and the future exchanges by making coverage more affordable. For employees who buy coverage on their own or will do so in the future, the individual mandate helps make that coverage more affordable by providing incentives for healthier and younger people to buy coverage earlier rather than when they need it in the future.

OUTLOOK: *The federal government will appeal Florida's ruling and the earlier Virginia ruling against the individual mandate. Eventually one of the cases will reach the Supreme Court, which will ultimately decide on the constitutionality of an individual mandate, likely before 2014.*

BACKGROUND: The ACA will require that all people who can afford it obtain health insurance or face federal income tax penalties, beginning in 2014.

Florida U.S. District Judge Roger Vinson recently ruled that the health care law's individual mandate exceeded Congress' Constitutional authority under the Commerce Clause and the Necessary and Proper Clause and he ruled both the mandate and the entire law unconstitutional.

Link to the Business Group's recent Public Policy Alert:

<http://www.businessgrouphealth.org/members/secureDocument.cfm?docID=3034>

Previously, federal judges Michigan and Virginia ruled in favor of the administration and upheld the law.

NATIONAL BUSINESS GROUP ON HEALTH VIEW ON THESE ISSUES: The Business Group believes that the individual coverage requirement is essential to the health care law, it will provide protection from catastrophic financial loss and it will stabilize the functioning of health insurance risk pools by including more healthy people who currently do not have coverage.

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 Steve 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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