Trump Administration Proposes Rules to Expand Access to Short-term Health Plans

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Health Care

On October 12, 2017, President Trump issued an executive order, entitled "Promoting Healthcare Choice and Competition Across the United States", that, among other things, instructed the Secretaries of Health and Human Services (HHS), Labor, and Treasury to "consider proposing regulations or revising guidance, consistent with law, to expand the availability of [short-term, limited duration insurance]" and to "consider allowing such insurance to cover longer periods and be renewed by the consumer."

Last month, the Departments of Treasury, Labor, and HHS ("the Departments") released a proposed rule implementing the Executive Order. Under the proposed rule, consumers would be able to purchase "short-term" health plans – which do not comply with the Affordable Care Act's (ACA) benefits requirements and consumer protections – that last for up to 364 days, as opposed to the maximum of three months permitted under current law.

Background

Currently, short-term, limited-duration insurance (also "short-term health plans" or "short-term coverage") is a kind of health insurance coverage intended to fill temporary gaps in coverage that may occur when an individual transitions between health insurance plans, such as during a change in employment. Enrollees in short-term plans are not eligible for premium tax credits or cost-sharing reductions, and short-term coverage need not comply with the ACA's requirements. *See* Public Health Service Act ("PHS Act") § 2791(b)(5). For example, short-term plans need not cover essential health benefits, and insurers can deny short-term plans to individuals with pre-existing conditions and can charge higher premiums as a result of pre-existing conditions. In addition, short-term plans are not required to cap the individual's out-of-pocket costs.

Before 2016, short-term plans could not last for more than 12 months. 62 Fed. Reg. 16894, 16928, 16942, 16958 (April 8, 1997); 69 Fed. Reg. 78720 (December 30, 2004). However, to prevent short-term health plans from being sold as a type of primary coverage, and to avoid adverse selection impacts on the risk pool for ACA-compliant plans, the Obama administration finalized rules that prohibited short-term plans from providing coverage for more than three months. 81 Fed. Reg. 75316 (October 31, 2016).

Proposed Rules on Short-term Health Plans

The proposed rules seek to amend the definition of short-term, limited-duration insurance so that it may offer a maximum coverage period of up to 12 months, as opposed to the current limit of three months. 83 Fed. Reg. 7439 (Feb. 21, 2018). The Departments seek comments regarding whether the length of short-term insurance should be some other duration, as well as the conditions under which issuers should be able to allow short-term insurance to continue for longer than 12 months. *Id*. at 7440.

Under current law, short-term health plans cannot be renewed, and individuals must reapply each time. The proposed rules solicit comments on whether any processes for expedited or streamlined reapplication for short-term coverage would simplify the reapplication process and minimize the burden on applicants, and whether federal standards are appropriate for such processes. *Id*. As an example, the proposed rules explain that "an expedited process could involve setting minimum federal standards for what must be considered part of the streamlined reapplication process while allowing insurers to consider additional factors in accordance with contract terms." *Id*.

Additionally, the proposed rules would revise the required notice that must appear in the contract and any application materials for short-term coverage. In the proposed rules, the Departments express concern that short-term coverage lasting almost 12 months may be difficult for consumers to distinguish from ACA-compliant coverage, which is usually offered as a 12-month plan. *Id*. at 7438. As a result, the Departments propose that the following notice be required to be prominently displayed (in at least 14 point type) in the contract and in any application materials provided with enrollment:

> THIS COVERAGE IS NOT REQUIRED TO COMPLY WITH FEDERAL REQUIREMENTS FOR HEALTH INSURANCE, PRINCIPALLY THOSE CONTAINED IN THE AFFORDABLE CARE ACT. BE SURE TO CHECK YOUR POLICY CAREFULLY TO MAKE SURE YOU UNDERSTAND WHAT THE POLICY DOES AND DOESN'T COVER. IF THIS COVERAGE EXPIRES OR YOU LOSE ELIGIBILITY FOR THIS COVERAGE, YOU MIGHT HAVE TO WAIT UNTIL AN OPEN ENROLLMENT PERIOD TO GET OTHER HEALTH INSURANCE COVERAGE. ALSO, THIS COVERAGE IS NOT "MINIMUM ESSENTIAL COVERAGE". IF YOU DON'T HAVE MINIMUM ESSENTIAL COVERAGE FOR ANY MONTH IN 2018, YOU MAY HAVE TO MAKE A PAYMENT WHEN YOU FILE YOUR TAX RETURN UNLESS YOU QUALIFY FOR AN EXEMPTION FROM THE REQUIREMENT THAT YOU HAVE HEALTH COVERAGE FOR THAT MONTH.

Id. at 7440.

However, given that the penalty for violating the ACA's individual mandate is reduced to $0 for months beginning after December 2018 (i.e., the individual mandate has been modified so there is no longer a penalty for individuals not enrolled in health insurance), the Departments propose that the last two sentences of the notice only appear with policies that have a coverage start date before January 1, 2019. *Id*.

Implications

The Departments assert that the rule would help individuals who have been struggling with high premiums in ACA-compliant plans, predicting that short-term plans may cost significantly less than unsubsidized comprehensive coverage. *Id*. at 7441. The Departments also claim that the changes will result in increased choice as a result of broader access to health care providers compared to ACA-compliant plans that have narrow provider networks. *Id*. at 7442. The rules anticipate increased protection from catastrophic health care expenses for consumers who purchase short-term coverage but are currently uninsured. *Id*.

However, consistent with current law, short-term plans under the proposed rules would offer less consumer protection than ACA-compliant plans. Plans would be able to deny coverage due to pre-existing conditions, could limit the number of benefits provided, and cap the value of those benefits. *Id*. at 7443. For example, existing short-term plans often exclude maternity care, preventive care, prescription drug coverage, and mental health benefits. As the proposed rule explains, individuals switching from ACA plans could experience "reduced access to some services," and "increased out of pocket costs . . . possibly leading to financial hardship." *Id*. at 7442. Additionally, consumers who purchase short-term coverage and subsequently develop chronic conditions "could face financial hardship" until they can enroll in an ACA-compliant plan. *Id*. at 7443.

If the proposed rule is finalized, premiums would likely increase for those enrolled in Qualified Health Plans (QHPs) on the Exchange. The Departments estimate that, in 2019, between 100,000 and 200,000 individuals currently enrolled in ACA exchanges would switch to the short-term plans instead. *Id*. at 7441. Because "[i]ndividuals who are likely to purchase short-term, limited-duration insurance are likely to be relatively young or healthy", "the average monthly individual market premiums … [would] increase." *Id*. The Departments seek comments on these estimates. *Id*. Implementation of the proposed rules could also lead to instability in the individual market. "Allowing [young or healthy] individuals to purchase policies that do not comply with [the ACA] . . . could potentially weaken States' individual market single risk pools." *Id*. at 7441, 7443. This could result in individual market issuers experiencing higher than anticipated costs of care and financial loss, which could cause them to leave the individual market. *Id*. at 7443 "This proposed rule may further reduce choices for individuals remaining in those individual market single risk pools." *Id*.

Comments

The comment period for the proposed rules is open until April 23, 2018.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our firm:

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