Observations on Repealing/Replacing the ACA, and the Virtues of the Group Health Insurance System Generally

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Overview

Any legislative action relating to health insurance coverage should promote the employer-based health insurance system by making employers' provision of group health insurance more flexible, less burdensome and less costly.

Any legislation action addressing the ACA's individual "shared responsibility" rule must be accomplished in accordance with sound insurance principles related to sharing of risk. Legislation action can promote individual flexibility, but cannot allow unfettered access to insurance products only when the need for insurance coverage arises, just a Medicare does not allow such unfettered access without penalty.

The Value of the Employer-based Health Insurance System

The employer-based group health insurance system in America provides substantial and valuable benefits for employers, and to the nearly half of all Americans who benefit from the system:

- Roughly 150 million Americans receive their health insurance through the employer-sponsored group insurance arrangements, and the vast majority report they are largely satisfied with that insurance coverage.
- Employees reap valuable tax advantages from the employer-based system they would not enjoy in the individual health insurance marketplace.
- Employers use group health insurance as a valuable recruiting and retention tool.
- Group health insurance coverage allows employers the freedom to customize plan designs to best fit the needs and desires of their workforces.
- Employers aggregate data from their health insurance programs with data from disability and workers' compensation programs to enhance employee health and well-being, improve productivity and reduce costs.

The Need for Action Consistent with Sound Insurance Principles

Despite the political rancor related to the ACA's individual "shared responsibility" rule (i.e., the individual mandate), and the incoming Administration's pledge to repeal it, care must be taken to adhere to legitimate and sound insurance principles.

Existing rules compel insurers to issue a policy to any and all applicants, and prohibit insurers from limiting coverage due to pre-existing conditions. These rules, which shift great risk to insurers, coupled with the failure of the ACA's individual mandate to compel enough healthier individuals to enroll in the individual market (which would have helped spread that enhanced risk) contributed to the spiraling premiums in that market.

Not even Medicare works this way. For decades federal rules have afforded the nation's Medicare-eligible seniors with flexibility concerning when to enroll in the program. But if those individuals pass on the initial opportunity to enroll, and seek to enroll only later -- presumably when they are most in need of the benefits -- and are not leaping from other coverage (such a employer-based coverage), these late enrollees pay an ongoing late enrollment penalty to help mitigate the enhanced risk their delayed enrollment poses to program.

Legislative action addressing the individual mandate must adhere to similar principles. As with Medicare, if an individual passes on an initial opportunity to enroll in the individual market, and seeks to enroll later and is not transitioning from other coverage (such as employer-based coverage), some reasonable restriction must be imposed.

Blueprint for Action

Legislative and regulatory action related to health insurance should accomplish the following (in order of priority, by category):

Employer and Individual Mandates

- Repeal the Affordable Care Act's employer mandate. Elimination of the employer mandate restores to employers the flexibility to offer benefits best suited to their employee demographics, consistent with the employers' need to remain competitive.
- Repeal the Affordable Care Act's individual mandate, taking great care to substitute a structure granting individuals the flexibility to enter the individual market at the time of their choosing, but imposing reasonable restrictions and consequences on late enrollees in accordance with sound and long-standing insurance principles similar to those employed by Medicare for decades.This could take the form of one or more of many options, from premium surcharges to a late enrollment pre-existing condition restriction to the ability of insurers to refer the individual into state-operated high risk pools.

Tax-Related Issues Other Than the Mandates

- Retain the current income tax exclusion (for employees) of the value of employer-provided health insurance.

  [Note: Care should be taken in all communications and discussions to distinguish this income tax "exclusion" for individuals from the notion of employers' income tax deduction for their health insurance spend; nobody is talking seriously about curtailing or eliminating the latter, although there has been confusion in the media on this point, and even on Capitol Hill (although in the latter case the "confusion" may have been merely some politically-driven misdirection and obfuscation). The employer's health insurance expenses are simply ordinary and necessary business expenses, deductible in the ordinary course under Code section 162.]

- Grant employers a dollar-for-dollar tax credit for their health insurance expenditures and integrating such credit with a roll-back in corporate tax rates as part of a broader tax reform effort.
- Repeal the Cadillac Tax and other ACA-imposed taxes and fees on participants in the health insurance/healthcare sectors, which fees are ultimately passed on to employers

and their employees, directly or indirectly. These include the PCORI fee, and the taxes on insurers and both medical device and prescription drug manufacturers and importers.

Health Plan Administration

- Repeal the ACA-imposed employer reporting of health insurance coverage offers, and employer and insurer reporting of health insurance enrollment.
- Repeal the ACA-imposed employer reporting of health insurance coverage values on Forms W-2.
- Provide greater leeway for employers to provide federally-required disclosures electronically.
- Streamline, and allow employers to consolidate, most of the more than 50 separate employer-provided disclosures and reports related to health insurance coverage.

Employer Flexibility in Health and Wellness Plan Designs

- Strengthen the "bona fide benefit plan" safe harbor under the Americans with Disabilities Act to (1) render moot the EEOC's vague and complex wellness program rules and their related notice and authorization requirements, and (2) provide flexibility for employers to limit coverage of high-cost specialty drugs or other high-cost conditions that threaten health plan viability and sustainability. State high risk pools can serve as the safety net for affected employees and dependents.
- Repeal the limit on health flexible spending account contributions, and restore the ability of such accounts to reimburse over-the-counter medications on a tax-free basis.
- Modify current rules related to health savings accounts (HSAs) and their companion high deductible health plans (HDHPs) to (1) exclude from HSA-disqualifying coverage any first-dollar benefits via an onsite clinic and telemedicine, as well as primary care office visits, (2) increase the HSA annual contributions maximum to the HDHP out-of-pocket maximum amounts, (3) restore the ability of HSAs to reimburse over-the-counter medications on a tax-free basis.

To promote and protect the stability of the group health insurance market, no tax credits should be made available to individuals to defray the purchase of individual health insurance unless the individual (1) has not received an offer of employment-based coverage under any health insurance program considered minimum essential coverage (or better) under the ACA, and (2) has household income below three times the applicable federal poverty level.