

**President Donald J. Trump Executive Order:
Minimizing the Economic Burden of the Patient Protection and
Affordable Care Act Pending Repeal**

On Friday, January 20th, President Donald J. Trump signed an Executive Order to limit the fiscal burden of the *Patient Protection and Affordable Care Act* (ACA), grant greater flexibility to the States, and encourage the development of a free and open market.

Even though this is a first step towards the repeal or modification of the ACA, the vast majority of the provisions in the ACA cannot be changed through this Executive Order. For the actual law to be modified, action is required from Congress. This Executive Order does make President Trump's intentions very clear and further supports his intentions to repeal all, or portions of, the ACA.

There are certain aspects of the law that the Obama administration has aggressively asserted the authority of *The Department of Health and Human Services* (HHS) to make modifications or exceptions through issuance of regulations/FAQs. This historical focus on elasticity that was not written into the word of the law, now gives HHS, and other departments, more flexibility to adhere to the spirit of this Executive Order.

Since HHS has been allowed to grant hardship exemptions for a variety of reasons by the prior administration, it sets a precedent for HHS to grant exemptions to anyone who does not have coverage by citing fiscal burden.

Additionally, the specific services required to be covered at 100% under Preventive Care were not set by Congress, but instead, were specified by HHS through issuance of regulations/FAQs. The leeway granted under the Executive Order could allow HHS to settle pending lawsuits about contraception in favor of the employer and allow new exemptions to this rule.

This Executive Order can be viewed as an order of 'non-enforcement'. The law may still exist until action by Congress, but HHS and other departments, in the roles they were given by the law, can modify, exempt, or refuse to enforce any rule that impacts the named entities in the Executive Order to a certain degree.

Currently, we do not have further guidance on how this Executive Order will affect self-funded employers. Many self-funded employers have specifically asked how this Executive Order will affect the regulatory requirements and possible tax burden under Pay or Play. Since self-funded employers are purchasers of healthcare, it is our opinion that Pay or Play (and other burdensome requirements) may not be enforced. However, since the provision has not been repealed or modified, it is best practice to continue to comply as before until repeal or new rules are published.

Another topic of consideration and great importance in the Executive Order is the promotion of a "free and open market." While this is an exciting idea in theory, caution should be used whenever the government is involved in a mandate regarding pricing and the market. Frequently government mandates are just an opportunity for special interest groups to purchase exemptions allowing them to not comply.

On Monday, January 23, a bill was introduced into the Senate called the 2017 Patient Freedom Act (there are several pending alternatives in the House). The main priority of this bill would be to repeal both the individual and employer mandates. This bill does address repealing certain plan design requirements; however, there are provisions of the ACA that will be retained.

The FMMA will update our membership as more information becomes available.

- Meg Freedman, Executive Director, Free Market Medical Association