Evaluating the Impact of the Trump Administration's New Regulations to Expand Association Health Plans and Short-Term, Limited-Duration Plans

Within the past few months, federal agencies passed two major healthcare regulations that could have significant consequences to the healthcare market. The Department of Labor (DOL) issued a final rule on Association Health Plans (AHPs) that expands the definition of "employer" under the Employee Retirement Income Security Act (ERISA), and the Departments of Health and Human Services (HHS), Labor, and Treasury issued a final rule that expands access to short-term, limited-duration coverage plans (STLDs). The two plans should not be conflated with each other as they offer health insurance coverage for different consumers with slightly different benefits. The most important similarity between the two plans is the lack of consumer or healthcare anti-discrimination protections one would find in an Affordable Care Act (ACA) marketplace plan. Ultimately, the new AHP and STLD regulations could hurt consumers in the long run due to the anticipated rise in premiums for ACA marketplace plans and the risk of incurring medical debt from purchasing cheaper plans with fewer benefits.

The Expansion of Association Health Plans

Association Health Plans are group health plans that employer groups and associations form by pooling their employees together as a group to buy insurance.[1],[2] Previously, self-employed individuals, such as sole-proprietors with no employees, could not join an AHP because they did not fall within ERISA's definition of "employer." The new AHP regulation aims to expand coverage at an affordable price to small businesses by setting a new flexible "commonality of interest" test for employers to meet. It relaxes the definition of "employer" to allow more small businesses, including self-employed individuals, to form or join AHPs based on common geography or industry.[3] Common geography includes state, city, county, or even multi-state metro area, such as the Tri-State region, and common industry includes the same trade or line of profession.[4] Based on the expanded criteria under the new regulation, employers can band together for the sole purpose of providing health insurance coverage, as long as they have a substantial business purpose unrelated to providing benefits.[5],[6] The new regulation has notably left the term "substantial business purpose" open for interpretation to allow more pathways for small businesses to join together. Finally, previously existing AHPs may continue to operate just as before, and new plans have the option to follow the new or old guidance.

AHPs are generally more affordable health plans because small businesses have the flexibility to choose which benefits they will offer to employees. However, this also means less coverage, as AHPs do not have to provide the ACA-mandated 10 essential health benefits, such as coverage for prescription drugs and rehabilitative services.[7] Nevertheless, AHPs do provide some ACA protections, which are woven into the new regulation, including prohibition on charging higher premiums based on a health factor or denying coverage to individuals with pre-existing conditions.

Despite the anti-discrimination protections, however, individuals with pre-existing conditions may still find it difficult to obtain affordable comprehensive coverage. AHPs can use factors such as gender, age, and industry, to estimate who will be expensive to insure and then charge different premiums based on those non-health status factors. For example, AHPs may charge companies with a significant proportion of female employees higher premiums in anticipation of maternity care charges.[8]

The Expansion of Short-Term, Limited-Duration Plans

Short-term, limited-duration plans were specifically designed as affordable health insurance coverage for individuals who find themselves without medical coverage temporarily.[9] Because they are exempt from ACA benefit requirements, these plans typically have lower monthly premiums than most ACA-compliant plans. Similar to AHPs, STLDs do not need to provide coverage for prenatal and maternity care, mental health and drug treatment, or prescription drugs.[10]

Furthermore, STLDs do not carry the same consumer protections as ACA marketplace plans do. Most notably, unlike AHPs, STLDs are not required to cover pre-existing conditions, which include any condition the individual sought treatment for within the past 5 years prior to enrollment (even minor treatments like allergies).[11],[12] In addition, STLDs can have higher deductibles than what the ACA allows and are not subject to cost sharing limits. STLDs may impose lifetime, annual, and even daily limits for care.[13],[14] These restrictions can result in a higher financial burden for those enrolled in STLDs, either due to an unexpected medical condition or a financial cap for a medical service that is covered by the plan. STLDs can also discriminate consumers based on their age and gender and charge higher premiums than allowed under the ACA.[15]

Prior to the new regulation, STLDs could only cover an individual for up to 90 days and were not renewable; however, the new regulation allows STLDs to last up to 364 days and be renewable for up to 36 months.[16] The new regulations require STLDs to include consumer warnings that the plan does not meet federal insurance requirements. However, because STLDs, unlike ACA-marketplace plans, are not required to spend 80% of premium dollars on medical care and therefore allow insurers to retain a larger amount of the premium dollars for overhead and profit,[17] these insurers and insurance brokers are incentivized to aggressively market STLDs to consumers. As a result, even with the consumer warning requirement, deceptive and aggressive advertisements may lead consumers to fall under the false assumption that the plan they are purchasing covers the full gambit of health care benefits. In addition, insurers and brokers may take advantage of consumer confusion to further promote STLDs. As new regulations to expand non ACA-compliant STLD plans go into effect on October 2, 2018, there are already reports of companies intentionally using ACA-marketplace open enrollment, [18] set to begin just a month after new STLD plan take effect, as a platform to aggressively market STLDs to consumers.[19] Due to this proximity and overlap in the enrollment periods, unsuspecting consumers[20] who may not know what type of plan they are purchasing may fall victim to the marketing of STLD plans and end up with limited health coverage.

The Consequences of These New Regulations

In some ACA marketplaces, health insurance may still be too expensive for some consumers, and AHPs and STLDs offer an attractive, cheaper option. However, consumers must be aware that the price difference comes at the expense of fewer medical services and less protection. While these plans are cheaper up front, those who choose to enroll in substandard AHPs and STLDs may be hit with high medical bills and accrue substantial medical debt if they develop serious or unexpected illnesses because their plans do not cover the ACA-mandated 10 essential health benefits. As such, the expansion of AHPs and STLDs may exacerbate hidden consumer costs due to the lack of consumer protection.

For individuals who are able to afford comprehensive ACA marketplace plans, they will likely see their premiums increase due to the combined effect of the lack of individual mandate penalty and the expansion of AHPs and STLDs. These non-ACA-compliant plans primarily attract companies with young, healthy employees and consumers who are willing to take a risk with a cheaper, less comprehensive health insurance plan. As healthier individuals gravitate toward AHPs and STLDs and exit the ACA marketplace, the number of individuals with serious or chronic healthcare will make up a larger percentage of the market. This will cause premiums in the ACA individual and small-group marketplace to increase, because the risk pool becomes smaller and more expensive with less healthy individuals to balance the cost of more high-risk individuals who are relatively less healthy. The new regulations will hurt middle income consumers with preexisting conditions the most because they have no choice but to pay higher premiums to get a comprehensive health insurance plan.[21]

The Trump Administration expanded AHP and STLD coverage to give Americans more affordable health care insurance options to combat rising health care costs.[22] Unfortunately, both new regulations fail to address the heart of the health care price crisis and instead, will further destabilize the ACA-marketplace risk pool and cost the government more money. As premiums increase in the ACA marketplace due to the anticipated outflux of healthy individuals, the government will need to increase government spending to fund consumers who receive federal premium tax credit subsidies to pay for ACA-marketplace plans. The Trump Administration estimates that federal government spending will increase between $96 million to $168 million per year from expanded STLD coverage alone. The chief actuary takes it a step further and estimates it will fall closer to $1.2 billion over the next year, with a total of $39.7 billion over the next 10 years.[23]

More recently, a pair of lawsuits has been filed against the Trump administration for the expansion of STLDs and AHPs respectively. In the lawsuit against the expansion of STLDs, seven healthcare groups emphasize how the new regulation harms people with pre-existing conditions. [24] Because individuals with pre-existing conditions are not covered by STLDs, they must remain with their comprehensive ACA-marketplace plan to receive sufficient medical care, and therefore must pay higher premiums as a result of the expansion of non-ACA compliant plans.[25] In the lawsuit challenging the new AHP regulation, a group of eleven states and Washington, D.C. allege that it violates the Administrative Procedure Act and undermines Congress's goal in enacting the ACA.[26] Both lawsuits focus on the lack of consumer protection and the increased health care costs that will result from the new regulations.

Mitigating the Negative Effects of AHPs and STLDs

It is anticipated the Trump Administration's goal to expand affordable health insurance coverage will bring risks of increased consumer confusion, higher premiums, and limited coverage when consumers need it the most. Luckily, states are not preempted from regulating AHPs or STLDs as they see fit and may create their own state-level regulations to protect consumers. For example, states could limit STLDs back to 90 days, require both plans to comply with ACA-mandates, or even ban the plans altogether. On September 22, 2018, California took steps to regulate STLDs when Governor Jerry Brown signed SB 910 that outright bans STLDs for Californians.[27] Additionally, because ACA open enrollment falls close to AHP and STLD enrollment, extra effort should be invested in ensuring consumers do not confuse ACA marketplace plans with AHPs and STLDs and clearly understand what they each provide. Both Congress and the states should consider regulatory safeguards that can be implemented to protect consumers from falling victim to non-comprehensive plans.

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[2] *About Association Health Plans*, U.S. Department of Labor, https://www.dol.gov/general/topic/association-health-plans (last visited September 28, 2018).

[3] *Id.*

[4] *Id.*

[5] Andrews, *supra* note 1.

[6] Jay Mark Waxman & Morgan J. Tilleman, *Association Health Plans—The Final Rule is Issued*, Health Care Law Today (July 10, 2018), https://www.healthcarelawtoday.com/2018/07/10/association-health-plans-the-final-rule-is-issued/.

[7] Andrews, *supra* note 1.

[8] *Id.*

[9] Karen Pollitz et al., *Understanding Short-Term Limited Duration Health Insurance*, Henry J. Kaiser Family Foundation (Apr. 23, 2018), https://www.kff.org/health-reform/issue-brief/understanding-short-term-limited-duration-health-insurance/.

[10] Nancy Metcalf, *Is 'Short-Term' Health Insurance a Good Deal?*, Consumer Reports (Dec. 22, 2017), https://www.consumerreports.org/health-insurance/is-short-term-health-insurance-a-good-deal/.

[11] *Id.*

[12] Margot Sanger-Katz, *What to Know Before You Buy Short-Term Health Insurance*, N.Y. Times (Aug. 1, 2018), https://www.nytimes.com/2018/08/01/upshot/buying-short-term-health-insurance-what-to-know.html.

[13] Metcalf, *supra* note 10.

[14] Sanger-Katz, *supra* note 12.

[15] Sarah Lueck, *Key Flaws of Short-Term Health Plans Pose Risks to Consumers*, Center on Budget and Policy Priorities (Sept. 20, 2018), https://www.cbpp.org/research/health/key-flaws-of-short-term-health-plans-pose-risks-to-consumers.

[16] U.S. Department of Labor, *supra* note 2.

[17] Metcalf, *supra* note 10.

[18] Robert Pear, *'Short Term' Health Insurance? Up to 3 Years Under New Trump Policy*, N.Y. Times (Aug. 1, 2018), https://www.nytimes.com/2018/08/01/us/politics/trump-short-term-health-insurance.html.

[19] Lueck *supra* note 15.

[20] Metcalf, *supra* note 10.

[21] Lueck, *supra* note 15.

[22] Robert Pear, *Trump's Plan for Cheaper Health Insurance Could Have Hidden Costs*, N.Y. Times (May 15, 2018), https://www.nytimes.com/2018/05/15/us/politics/trump-health-insurance-costs.html.

[23] *Id.*

[24] Peter Sullivan, *Health Groups Sue to Block Trump Expansion of Non-ObamaCare Plans*, The Hill (Sept. 14, 2018), https://thehill.com/policy/healthcare/406674-health-groups-sue-to-block-trump-expansion-of-non-obamacare-plans.

[25] Peter Sullivan, *Health Groups Sue to Block Trump Expansion of Non-ObamaCare Plans*, The Hill (Sept. 14, 2018), https://thehill.com/policy/healthcare/406674-health-groups-sue-to-block-trump-expansion-of-non-obamacare-plans.

[26] Nathaniel Weixel, *States Sue Trump Administration Over Expansion of Skimpy Group Insurance Plans*, The Hill (July 26, 2018), https://thehill.com/policy/healthcare/399063-states-sue-trump-administration-over-expansion-of-skimpy-group-insurance.

[27] Laura Mahoney, *California Governor Signs Ban on Short-Term Health Plans*, Bloomberg Law (Sept. 24, 2018), https://news.bloomberglaw.com/health-law-and-business/california-governor-signs-ban-on-short-term-health-plans/.