

Legislative Brief

Health Care Reform

January 2017

President Trump Signs ACA Executive Order and Regulatory Freeze Memo Issued

Quick Facts:

- On Friday, January 20th, on his first day in office, President Trump issued [Executive Order 13765](#) which seeks to “minimize the unwarranted economic and regulatory burdens” of the Affordable Care Act (ACA) and “afford the States more flexibility and control to create a more free and open healthcare market”.
- The Executive Order instructs the Department of Health and Human Services (HHS) and other regulatory agencies with authority over the ACA to exercise all available authority and discretion to waive, defer, grant exemptions from, or delay the implementation of any provision of the ACA that imposes a fiscal or regulatory burden on a State or a cost, fee, tax, penalty or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products or medication.
- The Executive Order is somewhat symbolic in nature in that it is limited by existing statutes (rules) and regulations. It does not change any current rules or regulations, and it does not grant any agency additional regulatory authority over what it already possesses. However, the Executive Order does signal the intent of the new Administration to make changes to the law as quickly as possible, even while the new heads of the various agencies are being finalized and Congress tries to address the issues requiring statutory change.
- In addition, a “Regulatory Freeze Pending Review” [Memorandum](#), issued the same day, outlines steps “to ensure that the President’s appointees or designees have the opportunity to review any new or pending regulations.”
- The requirements under the ACA should continue to be followed until further regulatory guidance is issued.

Background—What is an Executive Order and What Authority Does it Have?

An executive order is an official document signed by the President of the United States (President) that declares government policy. Although it cannot reverse a law passed by Congress, it can allow the President the opportunity to unilaterally bypass lawmakers. An executive order is a legally binding document that is written into the Federal Register (the official journal of the U.S. Government). An executive order is the means by which a current President may instruct government agencies and departments about changes in operations. Executive orders of past presidents can be overturned by the current President. Although executive orders are not laws, they can have far-reaching implications. Another executive action is the presidential memorandum, which generally has the same legal power and effect as an executive order if published. It provides the President with the ability to manage and govern the actions and policies of the federal agencies of the executive branch. The hierarchy (i.e., the level of authority given) generally is as follows: first proclamations, then executive orders, presidential memoranda, presidential notices and presidential determinations.

Some noted differences between an executive order and a presidential memorandum are as follows:

- An executive order is numbered and is required by law to be published in the Federal Register; a presidential memorandum is not numbered and may or may not be published, but publication gives presidential memoranda general applicability and legal effect.
- Executive orders may only be rescinded by another executive order; presidential memoranda can be changed with another presidential memorandum.

Executive Order 13765 and the Regulatory Freeze Pending Review Memorandum

As mentioned above, President Trump issued [Executive Order 13765](#) (the “Order”) with a broad directive to regulatory agencies with authority over the Affordable Care Act (ACA) [e.g., the IRS, HHS and DOL] to take any action possible “to the maximum extent permitted by law...to waive, defer, grant exemptions from, or delay the implementation of... [the ACA].” The goal of the Order is to reduce the economic and regulatory burdens faced by individuals, healthcare providers, health insurers and a host of others in the healthcare industry and to create opportunities for States to implement healthcare programs. Another goal is the development of healthcare markets across state lines which is expected to maximize options for consumers.

In the process of achieving these goals, the agencies are charged with complying with the Administrative Procedure Act (APA) and other statutes when revising regulations issued through notice-and-comment rulemaking procedures. Under the APA, agencies cannot rescind existing regulations until they engage in a new notice-and-comment rulemaking process, which includes required public comment periods and delayed effective dates. The APA makes it difficult to overturn federal regulations which have already been implemented. However, regulations that haven’t taken effect can be suspended, thus the President’s Chief of Staff issued the [Regulatory Freeze Pending Review Memorandum](#) (Memorandum). The Memorandum instructs federal agencies to cease issuing new regulations and withdraw rules that have been sent to the Office of the Federal Register until they can be reviewed by the new agency heads.

Timing Issues

In addition to the timing issues raised with complying with the APA, many of the new Administration’s choices to head various agencies have not yet been confirmed by the Senate. This process will take time, since once agency heads are confirmed, these agencies, under new direction, will need time to plan, draft, and release official guidance.

Impact on Employers and Employer Action

The Order has no immediate effect on employers. Until further regulatory guidance is released, all provisions of the ACA currently in effect should continue to be followed. For example, the final regulations implementing the employer mandate and its reporting requirements remain in effect and are subject to enforcement by the IRS.

Employers with 50 or more full-time employees (including full-time equivalents) and employers with self-insured health plans should continue to comply with the ACA reporting requirements.

Once President Trump’s appointments to the regulatory agencies are seated, there will likely be new regulations proposed to ease the ACA’s economic and administrative burdens, but as noted, that process will take some time. At this juncture, it is difficult to predict exactly what changes will be made by the regulatory agencies or when those changes will occur. However, for the immediate future, employers should stay the course and maintain compliance with the current ACA.

Kapnick’s Compliance Department will be monitoring these changes and will continue to provide you with updates and action items as new developments occur. If you have any questions regarding this Executive Order, please contact your Client Executive.

The health care reform law—the Affordable Care Act (ACA)—has many complex requirements for employers and health plans. Please contact Kapnick Insurance Group with any questions about how you can prepare for any of the health care reform requirements. This Kapnick Insurance Group Update is not intended to be exhaustive nor should any discussion or opinions be construed as legal or tax advice. The information contained in this communication is intended to provide general information regarding health care reform and related topics, and is based on general information available at the time it was prepared. Readers should contact their tax and/or legal counsel for advice that is appropriate to their specific circumstances. This information cannot be used by any taxpayer to avoid tax penalties.

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