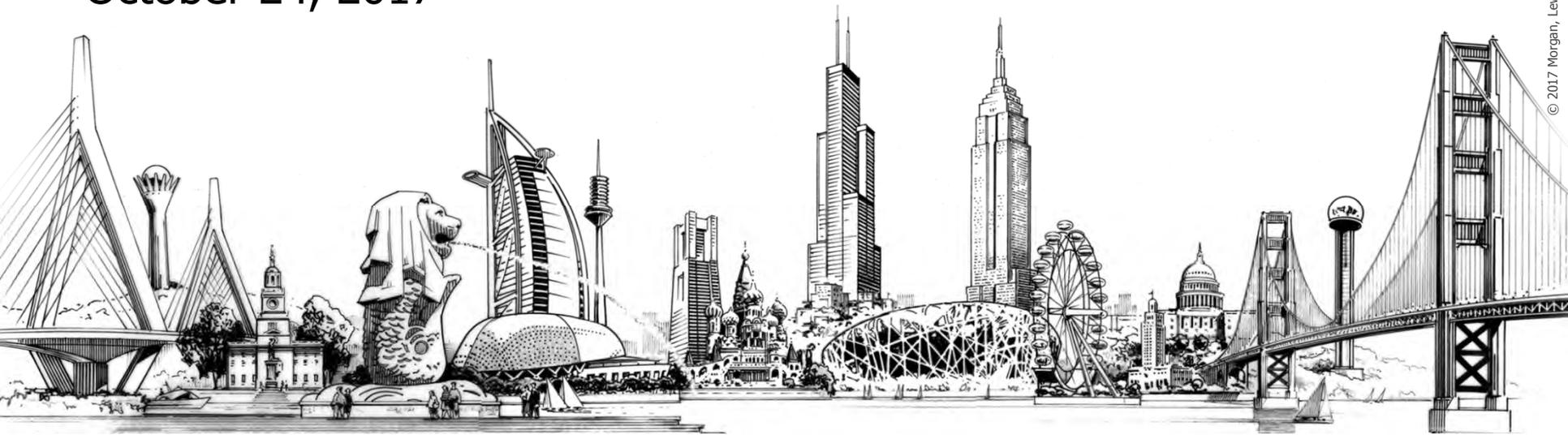


Morgan Lewis

AFFORDABLE CARE ACT: POTENTIAL CHANGES, LIKELY EFFECTS

Presenters: Andy Anderson & Kimberly Boggs

October 24, 2017



Agenda

- Inaugural “Day 1” Executive Order
- CMS Exchange Modifications
- Repeal and Replace
- Contraception
- October 12 Executive Order
- End (?) of Cost-Sharing Reduction Payments
- Tax Reform
- Likely Effects for Employers

INAUGURAL “DAY 1” EXECUTIVE ORDER

Inaugural “Day 1” Executive Order

- Directed Secretary of HHS and other Executive departments, pending repeal, to:
 - Minimize the unwarranted economic and regulatory burdens of the Affordable Care Act (ACA)
 - Afford states more flexibility and control to create a more free and open healthcare market
 - To the maximum extent permitted by law, exercise all authority and discretion to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the ACA that would impose a fiscal burden on any 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 medications
 - Notable for its failure to reference “employers”!

CMS EXCHANGE MODIFICATIONS

CMS Exchange Modifications

- April final CMS regulations to stabilize Marketplace and affirm the traditional role of state regulators
- Revised rules regarding:
 - Special enrollment periods
 - Guaranteed availability
 - Annual Open Enrollment timing
 - Network adequacy
 - Essential community providers
 - Actuarial value requirements
- First indication that the new Administration was ready to pull on regulatory levers to revise the ACA, as outlined in “Day 1” EO

REPEAL AND REPLACE

Repeal and Replace

- House succeeds (on second attempt) to pass American Health Care Act (AHCA) of 2017 on May 4 (with one vote to spare)
 - Limited impact due to budget reconciliation process
 - Could only include items that had fiscal impact
 - 2016 “zero out” of tax on individual and employer mandates
 - 2017 repeal of PCORI, Reinsurance, Risk Corridors, Risk Adjustment, Credit Recapture, over-the-counter drug prohibition, FSA \$ cap, HSA 20% penalty (reduced to 10%), Device Tax, Health Insurance Tax, deduction of Medicare Part D reimbursement
 - 2019 repeal of ACA Premium Credits, Cost Sharing, etc.
 - 2023 repeal of ACA Medicare Tax Increase
 - 2026 delay of Cadillac Tax
 - Did not contain a cap on tax-free employer health insurance

Repeal and Replace (Cont.)

- AHCA did not change (among others):
 - Age 26 adult child coverage
 - Essential Health Benefit (EHB) rules—unless state seeks waiver in 2020 or beyond
 - Reporting (added to it starting in 2020 and likely revived HIPAA creditable coverage reporting related to preexisting condition changes to House bill)
 - Preventive care (note Executive Order regarding Religious Freedom)
 - Lifetime/annual \$ limits (unless benchmark state seeks EHB waiver)
 - SBCs

Repeal and Replace (Cont.)

- Senate fails—twice!
 - Could not achieve 50 votes necessary under budget reconciliation process
 - Considered House Repeal and Replace language plus myriad variations
 - Ran out of budget reconciliation time on September 30
 - Back to 60 votes necessary to pass legislation
 - Outbreak of bipartisanship?
 - Don't count on it without prodding (see CSR discussion below), or to fix severely broken ACA components

CONTRACEPTION

Contraception

- Years-long debate, regulations, and court cases carving out exceptions to the contraception requirement in the ACA preventive care rules
- Free Speech and Religious Liberty Executive Order May 4
 - Directed Tri-Agency Secretaries to consider issuing amended regulations to address conscience-based objections to ACA preventive care mandate
- October 6 Tri-Agency interim final rules that expand the grounds for claiming the contraceptive services exemption and the entities eligible to claim the exception
 - Religious belief: Any employer

Contraception (Cont.)

- Moral conviction: Any nonprofit or closely-held for-profit employer (excludes publicly-traded companies)
- Also makes a number of other key changes, such as:
 - Claiming the exemption based on sincerely held religious beliefs or sincerely held moral convictions
 - Exempt employers no longer have to file a notice of exempt status
 - Employers can provide bifurcated options—both with and without contraceptive services, if requested by employees

OCTOBER 12 EXECUTIVE ORDER

October 12 Executive Order

- Directs:

- Secretary of Labor to, within 60 days, consider expanding Association Health Plans
 - By, among other things, expanding existing DOL guidance related to commonality-of-interest
- Tri-Agencies to, within 60 days, consider proposing regulations or revising existing guidance to expand access to short-term limited-duration insurance
- Tri-Agencies to, within 120 days, consider proposing regulations or revising existing guidance to
 - Increase usability of HRAs
 - Expand employers' ability to offer HRAs
 - Allow HRAs to be used in conjunction with nongroup coverage
- HHS, Treasury, DOL and FTC to, within 180 days (and then every 2 years) report on items that fail to conform and potential further actions

October 12 Executive Order (Cont.)

- Big win for employers and HRAs
- Could lead to:
 - Small ball:
 - Integration with individual insurance policies
 - Big Thoughts: Reimagining status of HRAs as other than ACA health plans:
 - Stand-alone HRAs for active employees
 - Reintegration of retiree-only plans into active plans (as there is no need to be retiree-only for HRA purposes)
 - DC movement (stand-alone HRAs linked with individual/Marketplace policies)
 - Stand-alone HRAs for OOP expenses in absence of employer health plan offer
 - San Francisco solution?
 - Elimination of employer payment plan, etc., restrictions
 - Irrelevance for last year's small employer HRA legislation (21st Century Cures Act)

END (?) OF COST-SHARING REDUCTION PAYMENTS

End (?) of Cost-Sharing Reduction Payments

- Cost-Sharing Reduction (CSR) payments are made to insurers to reimburse them for reduced OOP costs that ACA provides to low-income Exchange participants
- Messy background with House suing Obama administration
 - Court agreed that CSRs not appropriated
- Insurers still have to provide reduced OOP costs even without CSR payments
- Long-threatened action to cut off CSRs finally taken late on October 12
 - Announced late same day as EO (followed by a next-day Tweet)
 - October 12 memo from HHS to CMS stating that Attorney General determined that CSR funds were not appropriated and that no other funds could be used
- Will have odd result of driving up ACA subsidy costs when insurers raise premiums

End (?) of Cost-Sharing Reduction Payments (Cont.)

- Insurers cannot withdraw in 2017 (past required 90 day notice)
- Some insurers built anticipated end of CSR payments in to 2018 premiums
 - Will insurers that did not foresee this result be able to increase premiums?
- Bipartisan approach to the rescue! (?)
 - Bipartisan Health Care Stabilization Act of 2017
 - Alexander/Murray Senate agreement to:
 - Reinstate CSR for a limited period (2107 through 2019)

End (?) of Cost-Sharing Reduction Payments (Cont.)

- Give states greater flexibility in ACA rule implementation through loosened 1332 waivers requirements
- Reinstates ACA Navigator budgets
- Expands catastrophic plans to individuals over age 30, and without a showing of economic hardship (“copper” plans)
- Just a kick-the-can outcome?
- Administration holding out for more expansive “repeal” changes.....
 - White House talking points released Monday ask for:
 - Repeal of individual mandate
 - Repeal of employer mandate
 - HSA expansions
 - Short term insurance
 - Association plan expansion
- Related state litigation to continue CSR payments

TAX REFORM

Tax Reform

- Watch For:
 - Possible modifications to tax-free employer health coverage
 - Recently heard senior Hill staffer state that “Employer deduction is health care reform territory—not Tax Reform”
 - Modifications to tax credits
 - Again, Health Care Reform instead?
 - Fate of Cadillac Tax
 - Postpone
 - Repeal
 - Other (Treasury actively working again on proposed rules)

LIKELY EFFECTS FOR EMPLOYERS

Likely Effects for Employers

- Opportunities for employers:
 - 2018 expanded HRAs, elimination of ridiculous employer payment plan rules
 - Future possibility of DC-only approach to health care (if employer mandate ends)
 - Contraception coverage change (in response to employer concerns or concerns on the part of employees)

Likely Effects for Employers (Cont.)

- Risks for employers:
 - Continued viability of ACA Exchanges
 - Particular risk for pre-65 retiree exchange designs being contemplated or already implemented
 - Active employee exchange designs highly unpalatable, even with possible HRA expansion
 - Cap on tax-free nature of group health coverage
 - Failure to repeal or further postpone Cadillac Tax
 - HHS promoting/potential legislation advocating state innovation waivers (Section 1332 waivers)
 - Five states already applied (HI, MA, VT, CA, AZ)
 - May weaken ERISA preemption

Likely Effects for Employers (Cont.)

- Timeline:
 - No chance of 2017 changes for employers
 - Maybe mid-2018 HRA changes (or 1.1.2019)
 - Continue to trudge down road of ACA reporting (for now)
 - All other ACA rules unchanged (until they change)
 - Will be a messy and confusing period until 2018 mid-year elections give clarity as to who controls Capitol Hill (and whether any party has the necessary votes and fortitude to make broader ACA changes)

Questions?

Biography



Andy Anderson

Chicago

T +1.312.324.1177

F +1.312.324.1001

Leader of Morgan Lewis's health and welfare task force, Andy R. Anderson is often recognized for his work in counseling clients on employer, individual, and insurer issues created by the Affordable Care Act, and regulatory compliance issues in relation to the Internal Revenue Code, ERISA, COBRA, HIPAA, and Mental Health Parity. Tax-exempt organizations and Fortune 500 companies turn to Andy for handling their benefit plans, and legal review surrounding welfare benefit plans, government self-correction programs, cafeteria plans, and VEBAs.

Biography



Kimberly J. Boggs focuses her work on tax and ERISA matters related to employee benefit plans and arrangements. Her current primary focus is on welfare benefits plans, and she regularly conducts comprehensive reviews of welfare benefit plans for compliance with operational and form requirements of the Internal Revenue Code, Affordable Care Act (ACA), ERISA, COBRA, and HIPAA.

Andy Anderson

Chicago

T +1.312.324.1758

F +1.312.324.1001

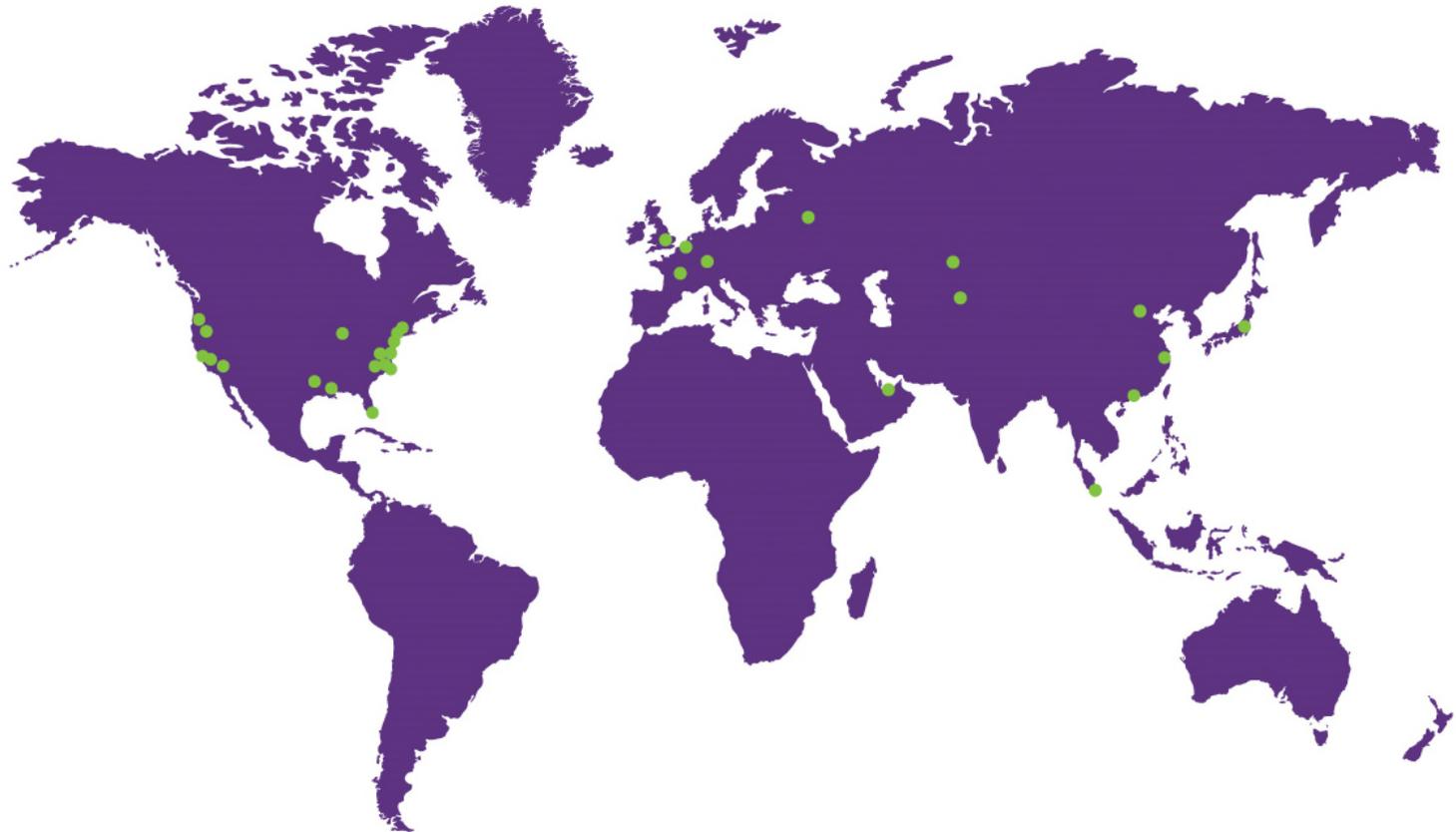
Morgan Lewis

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Almaty	Dallas	London	Paris	Shanghai*
Astana	Dubai	Los Angeles	Philadelphia	Silicon Valley
Beijing*	Frankfurt	Miami	Pittsburgh	Singapore
Boston	Hartford	Moscow	Princeton	Tokyo
Brussels	Hong Kong*	New York	San Francisco	Washington, DC
Chicago	Houston	Orange County	Santa Monica	Wilmington



Morgan Lewis

*Our Beijing office operates as a representative office of Morgan, Lewis & Bockius LLP. In Shanghai, we operate as a branch of Morgan Lewis Consulting (Beijing) Company Limited, and an application to establish a representative office of the firm is pending before the Ministry of Justice. In Hong Kong, Morgan Lewis has filed an application to become a registered foreign law firm and is seeking approval with The Law Society of Hong Kong to associate with Luk & Partners.

THANK YOU

© 2017 Morgan, Lewis & Bockius LLP
© 2017 Morgan Lewis Stamford LLC
© 2017 Morgan, Lewis & Bockius UK LLP

Morgan, Lewis & Bockius UK LLP is a limited liability partnership registered in England and Wales under number OC378797 and is a law firm authorised and regulated by the Solicitors Regulation Authority. The SRA authorisation number is 615176.

*Our Beijing office operates as a representative office of Morgan, Lewis & Bockius LLP. In Shanghai, we operate as a branch of Morgan Lewis Consulting (Beijing) Company Limited, and an application to establish a representative office of the firm is pending before the Ministry of Justice. In Hong Kong, Morgan Lewis has filed an application to become a registered foreign law firm and is seeking approval with The Law Society of Hong Kong to associate with Luk & Partners. This material is provided for your convenience and does not constitute legal advice or create an attorney-client relationship. Prior results do not guarantee similar outcomes. Attorney Advertising.