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- Submit an article for consideration.
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From the Co-Chairs

FROM THE CO-CHAIRS

**By: Marcia A. Kilby, Esquire
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There is an old holiday tune that proclaims this as “the most wonderful time of the year.” I think that this is undoubtedly true. The time spent with family and friends (and let’s not forget the good eats) are indeed wonderful! However, for corporate counsel, this time of year also means strategizing for 2018 and determining what new issues are waiting for us on the horizon. In my opinion, if there is one issue that will require attention from corporate counsel in the upcoming year it is this: Data privacy.

On May 25, 2018, a new landmark privacy law called the General Data Protection Regulation (GDPR) takes effect in the European Union (EU). The GDPR expands the privacy rights of EU individuals and places new obligations on all organizations that market, track, or handle EU personal data.

Specifically, the GDPR regulates the “processing,” which includes the collection, storage, transfer or use, of personal data about EU individuals. Any organization that processes personal data of EU individuals, including tracking their online activities, is within the scope of the law, **regardless of whether the organization has a physical presence in the EU.** As such, if you process data about individuals in the context of selling goods or services to citizens in EU countries, then you will need to comply with the GDPR.

Some Key Facts to Know About GDPR

- It broadly expands rights for EU individuals such as deletion, restriction, and portability of personal data.

Health Care Reform Developments under the Trump Administration

**By: Ashley N. Trotto, Esquire
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Unless you've somehow managed to avoid the buzz, you probably know that the Affordable Care Act ("ACA") is still alive and well (for now). What you may not know is exactly what the Trump Administration has been able to accomplish with respect to its health care reform goals. This article intends to recap what has been done and clarify what hasn't been done since inauguration day.¹

ACA Repeal

This fall, after several failed attempts, the Republicans tried one last time to repeal the ACA with the Graham-Cassidy bill. The bill would have eliminated the ACA's subsidized health insurance coverage and Medicaid expansion and provided block grants for state funding. However, too many Republican senators came out against the bill and the deadline to pass legislation with a simple majority came and went without a vote. As of today, the ACA continues to be the law of the land – with a few adjustments.

Contraceptive Mandate

The ACA mandates that health plans cover contraceptive care as a preventative service at no cost to covered individuals. However, religious employers, non-profit organizations with religious affiliations, and certain closely held corporations with sincerely held religious beliefs can opt-out of the mandate. Generally, for profit employers have been required to comply.

A shift occurred on October 6, 2017, when the Departments of Health and Human Services ("HHS"), Treasury, and Labor (the "Departments") issued interim final rules that broaden the scope of employers who can opt-out to include non-profit and for profit companies who have "sincerely-held moral convictions."²

The interim final rules do not define "moral convictions" (nor do they define "religious beliefs"), but the preamble states that the Departments seek to use the same background understanding of that phrase as reflected in the Congressional Record in 1973, which cites *Welsh v. United States* to support the addition of language protecting moral convictions. In protecting moral convictions parallel to religious beliefs, *Welsh* describes moral convictions

¹ WARNING – this article was written on December 13, 2017 and only takes into consideration action taken and official guidance issued as of that date.

² 82 FR 47862

warranting such protection as ones: (1) That the “individual deeply and sincerely holds”; (2) “that are purely ethical or moral in source and content; (3) “but that nevertheless impose upon him a duty”; (4) and that “certainly occupy in the life of that individual a place parallel to that filled by . . . God' in traditionally religious persons,” such that one could say “his beliefs function as a religion in his life.”³

As an interesting point, the Departments threw ordinary governmental procedure to the wind and issued these rules without first publishing proposed rules and requesting public comment. It is for this reason, in addition to claims of discrimination and violations of the First Amendment, that several lawsuits have been filed challenging the new rules.

The Executive Order

Six days after the interim final rules were published; President Trump signed an Executive Order ("Order") directing the Departments to consider proposing regulations or revising prior guidance on certain healthcare topics that have previously been regulated by the ACA.⁴ Although the Order lacks specificity and the nature and scope of the intended changes will not be clear until guidance is issued by the Departments, the Order generally focuses on changes to three issues: association health plans, short-term limited duration health insurance, and health reimbursement accounts.

First, the Order directs the Departments to permit individuals and small employers (those with under 50 full-time employees) to join together to form Association Health Plans ("AHPs"). It appears that the Order would exempt AHPs from certain insurance mandates, like community rating and essential health benefit requirements. The Order also suggests that employers will be permitted to band together across state lines. However, for this directive to be successful the Departments will have to tackle the current federal regulations that impose burdensome restrictions and reporting obligations on Multiple Employer Welfare Arrangements ("MEWAs"), as those regulations would generally act as a barrier to unrelated employers and individuals participating in the same group health plan.

Next, the Order covers short-term limited duration health insurance. The ACA currently provides for an exemption from its mandates for short-term, limited duration health plans to bridge the gap between health insurance enrollments, like in the case of an employee transitioning from one job to another. However, the exemption is limited to policies covering an individual for less than three (3) months.⁵ The Order directs the Departments to consider expanding the coverage offered by these short-term limited duration plans, but is not specific as to the extent of the expansion. The Order seems to infer that the Administration would be satisfied if the Departments reverted to pre-ACA guidelines which would permit coverage for up to 12-months with the option to renew in certain circumstances.

³ *Welsh v. United States*, 398 U.S. 333 (1970).

⁴ Executive Order, *Promoting Healthcare choice and Competition Across the United States*, available at <https://www.whitehouse.gov/the-press-office/2017/10/12/presidential-executive-order-promoting-healthcare-choice-and-competition>

⁵ 26 CFR 54.9801-2.

Finally, the Order directs the Departments to consider changes to Health Reimbursement Account ("HRA") limitations to allow employees more flexibility and choices regarding their health care. In 2013, the Departments issued guidance prohibiting employers from reimbursing employees for individual insurance policies. The Departments characterized these arrangements as stand-alone HRAs and concluded that they were health plans that by their very nature would not be ACA compliant. Congress later created a limited exception to this rule for small employers that meet certain strict requirements. Although it isn't particularly clear, the Order seems to direct the Departments to broaden that exception to a wider range of employers and may intend for the Departments to ease the existing limits on reimbursable amounts (currently \$4,950 for self-only coverage or \$10,000 for family coverage) to provide additional employee flexibility and choice with respect to healthcare.

Cost-Sharing Subsidies

The ACA's cost-sharing subsidies, not to be confused with premium tax credits, reduce an eligible individual or family's out-of-pocket cost when they use health care services, such as deductibles, copayments, and coinsurance.

Taking further action to fulfill his promise to let the ACA fail, late on October 12, 2017, President Trump acted on his long-standing threat to cease funding these cost-sharing subsidies. Although the ACA directed these payments, it relied on Congress to appropriate the funds. When Democrats lost control of Congress, the Republican-led Congress declined to allocate the required funding, leaving the Obama Administration to do so through executive action. The Trump Administration ceased funding the subsidies based on the premise that Congress, not the President, has the responsibility and authority to appropriate the funds.

It is important to note that because insurers are required by law to provide them; cost-sharing subsidies are still available for eligible individuals. The problem is that the federal government will no longer be reimbursing insurers for these subsidies, leaving insurers to find other ways to maintain the status quo (e.g., premium increases).

Tax Reform

I would be remiss if I didn't at least mention the possibility that the Administration's current tax reform efforts may be broad enough to affect healthcare. For example, the Individual Mandate which requires most Americans to have and maintain health insurance coverage or pay a penalty may be on the chopping block.

This Administration has been and continues to be focused on healthcare and I don't expect a seismic shift in that focus anytime soon. Stay tuned, things are bound to change.