What does Washington have in store for employer-sponsored health insurance?

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Overview

1) Congress
2) The Courts
3) Federal Regulators
4) November Election
5) Trending issues
6) Employers

1) Congress addresses health care

- Efforts to repeal the Affordable Care Act have not been successful
  - BUT Cadillac tax has been delayed for two years, until 2020
    - Hopefully will never see light of day
- House Speaker Paul Ryan intent on forging alternative to the ACA
  - Planned unveiling of “white paper” before Republican convention in July
- In the crosshairs now: the employee exclusion from income for employer-provided health care
  - Few champions of employer-provided health care in either party
  - Trimming the exclusion would raise many of the same horrendous problems and complexities as the Cadillac tax
- Options include a broad cap, means-testing, phase-out, tiers, geographic variations, and more

House GOP Task Force

- Who are the official members?
  - Rep. Tom Price (GA), Chairman, House Budget Committee
  - Rep. John Kline (MN), Chairman, House Education & Workforce Committee
  - Rep. Fred Upton (MI), Chairman, House Energy & Commerce Committee
  - Rep. Kevin Brady (TX), Chairman, House Ways and Means Committee

But who is really calling the shots?

Republicans have a general recipe for “health reform”

1) Coverage:
   - Block grant Medicaid
   - Medicare premium-support (or has this become too toxic?)
   - Broad-based insurance tax credits
   - High-risk pools
2) Costs:
   - Consumerism (HSAs, price transparency, etc.)
   - Competition (interstate purchasing)
3) Quality: ???
4) Pay-fors:
   - We have a lot more information about what they CAN’T use to offset

How can Republicans pay for a coverage expansion?

1) No new taxes! Kind of. See below.
2) No deficit spending
3) No cuts to Medicare
4) No “fake” pay-fors

So are we left with anything BUT the employer exclusion?

Could this explain why it will likely be used as the pay-for despite so many objections within the GOP caucus?

And what about the Democrats, how wedded are they to existing provisions in the ACA?

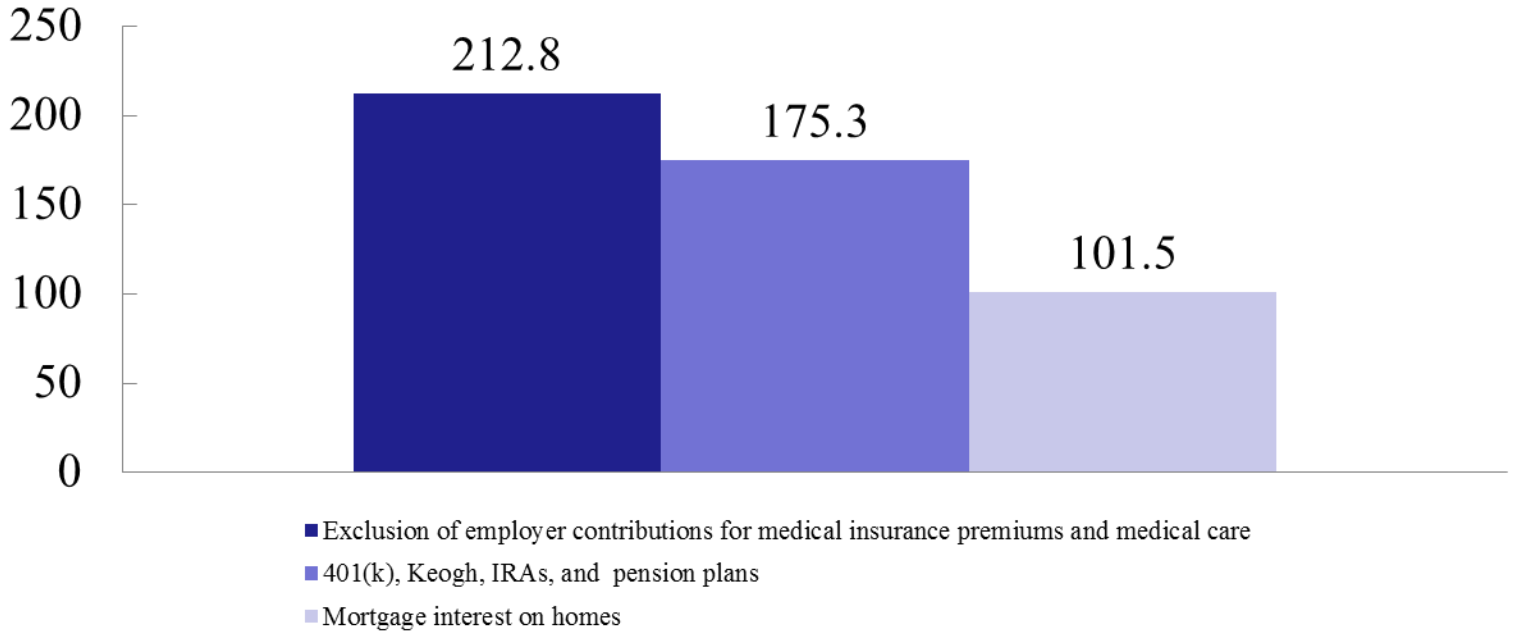
- Remember, House Democrats were dragged kicking and screaming to vote for ACA. They had their own bill but got jammed by the Senate!

- Notable wedges between ACA and House Democratic caucus:
  - Their bill did not include a Cadillac tax. It was funded by income taxes on wealthy individuals. They oppose a “tax on benefits”
  - House Democrats were adamant about including a “public option” to compete with private insurers
  - House bill did not include IPAB (Medicare-cutting commission)
  - Subsidies to expand coverage to even more people

- Many Democrats consider ACA only the first step, and under the right circumstances would be open to making major changes

Good News for People Who Love Bad News: Top Income Tax Expenditures FY 2014

- **Estimated dollars in billions**



Source: Office of Management and Budget (OMB), *Analytical Perspectives, Budget of the U.S. Government, Fiscal Year 2014.*

Why is Congress looking at the employer exclusion?

- House W&M requests JCT report: Exclusion valued at $323.3 billion in calendar year 2016 alone! Contrast: Entire ACA $1.2b / 10 years
  - The largest “tax expenditure” out there
- House Republicans are looking at the exclusion as an offset
  - Need revenue to fund new tax credits
  - Eager to create “parity” between those with and w/o employer coverage
- Disruption of ERISA plans could affect up to 175 million Americans, far greater than the number of uninsured even before ACA
- Besides the very high dollar value (as a pay-for), many Republican health economists believe that having 3rd party payers in itself is a major driver of America’s astronomical health costs
- Meanwhile, as Congress thinks about tax reform or ACA replacement, the clock ticks on the Cadillac tax
  - Employers need to figure out how to avoid it or comply
  - Regulatory guidance on the Cadillac tax is not out

Can employers really avoid the Cadillac tax? Factors affecting the cost of a plan

- Remember, the tax is based on the cost of the plan – NOT on actuarial value, benefit generosity, etc.
- From 12/14 Milliman report: impact on baseline cost of plan (isolated factors)
  - Geographic area: 69.3%
  - Industry: 20.0%
  - Provider discounts: 15.7%
  - Group size: 10.5%
  - Expense factors: 6.3%
  - Benefit generosity: 6.2%
- Most of this is outside the employer's control
- Whether Cadillac tax or capped exclusion, same problem

What CAN an employer do to reduce exposure to the Cadillac tax?

- Reduce or eliminate employer contributions to consumer-directed accounts (HSA, FSA, HRA)
- Tighten networks, require prior authorizations, restrict formularies
- Reduce coverage of spouses and dependents
- Separate vision and dental plans from medical coverage
- Drop PPOs and move to HMO or high-deductible plans
- Consider impact of onsite clinics, wellness programs, telehealth

Congress believes that mandated coverage combined with downward pressure from the tax code will cause plan sponsors to innovate to reduce costs. Is this realistic?

Can the Cadillac tax be repealed?

- Already delayed 2 years, bipartisan support for repeal.
- However, CBO estimates repeal could cost $80 billion over 10 years.

	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2020	Total
	Net Changes in the Deficit From Repealing Insurance Coverage Provisions											
Exchange Subsidies[a]	-41	-69	-78	-82	-83	-86	-91	-94	-98	-101	-353	-822
Medicaid and CHIP Outlays	-44	-66	-71	-75	-82	-88	-93	-97	-102	-106	-339	-824
Small-Employer Tax Credits[b]	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-5	-11
Subtotal	-86	-136	-150	-158	-166	-175	-184	-193	-201	-208	-697	-1,658
Penalty Payments by Uninsured People	4	4	4	4	4	4	5	5	5	5	19	43
Penalty Payments by Employers[b]	9	13	15	16	16	17	18	20	21	22	69	167
Excise Tax on High-Premium Insurance Plans[b]	0	0	X	X	7	9	11	14	17	21	16	87
Other Effects on Revenues and Outlays[c]	7	15	19	20	21	22	23	25	26	27	81	204
Subtotal	19	32	40	45	48	52	58	63	69	75	185	502
Net Decrease in the Deficit From Repealing Coverage Provisions	**-67**	**-104**	**-110**	**-113**	**-118**	**-123**	**-127**	**-130**	**-132**	**-133**	**-512**	**-1,156**

And is this estimate realistic?

- CBO assumes that employers will transfer money that otherwise would have been spent on health insurance, to taxable employee wages
- Few non-academics share this view

Is Congress likely to do anything this year?

- Election years are slower, but look for some health action:
  - Comprehensive mental health reform
  - Legislation to address the opioid epidemic
  - Medical innovation legislation / 21st Century Cures
  - Appropriations? More likely… CROmnibus

- Continuing Resolutions (CRs) and Omnibus legislation often attract important legislation – COBRA was created in one
  - Repealed "Wyden Waiver" employee opt-out provision
  - Other tweaks to ACA – CR-type bills seem to be only place Republicans will allow anything considered "improving Obamacare"

- What happens at the end of this year will depend on who wins the White House and what the Senate will look like next year

2016: Setting the stage for 2017 and beyond

- For Members of Congress much of this year is about messaging to lay groundwork for changes in 2017
- This is why some Rs are talking about expanding HSAs (despite the high budgetary costs of doing so)
- Sen. Wyden recently introduced legislation to lower out-of-pocket costs for Medicare beneficiaries
- The Senate Aging Committee is going after high drug costs (more on that later)

2) The Courts: New ACA court case

- U.S. District Court ruled on May 12 that the Administration "has been improperly funding an Obamacare subsidy program" as Congress never appropriated funds for the program
  - The judge allowed the program to continue pending appeal
    - Long way to go from this point to SCOTUS
  - Has potential to greatly upset functioning of Exchanges

Gobeille v. Liberty Mutual Insurance Company

- HUGE SCOTUS case delivers 6-2 opinion upholding ERISA preemption
  - Vermont state law required reporting by all health plans, including self-funded plans
  - Court told Vermont to knock it off; reporting requirements cannot extend to self-funded plans because they are central to uniform system of plan administration
- Fall-out from case
  - There are 18 states with all payer claims databases
  - Will the Department of Labor decide that all plans – self-funded and insured - throughout the country should report to create a national claims database?
  - What will Congress do?
  - What do employers want?

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String of cases on Retiree Health

- SCOTUS case *M&G Polymer v. Tackett*
  - Supreme Court removed the "thumb from the scale" in favor of finding that retirees are vested in the company's retiree health plan
  - String of decisions in lower courts since *Tackett* look to plan documents to determine whether retirees are vested for life
    - When contract is silent on duration of retiree benefits, cannot infer vesting for life

3) Federal Regulators – Wellness

- EEOC final regulations released on May 16
  - One on ADA, one on GINA
  - Same time: *Flambeau* case upholds use of ADA safe harbor; EEOC appeals to 7th Circuit (ERIC amicus brief)

EEOC Wellness Regs: Key Takeaways & Changes

- 50% inducement (tobacco) only if NO biometric element
- EEOC doubles down – says they can sue even if "wellness program" is insurance (no ADA safe harbor)
- 30% max incentive based on cost of self-only coverage (employee plus spouse)
- Effective immediately for most provisions, the rest 01/01/2017
- "Reasonable plan design" – must be designed to improve the health of enrollees – can't just collect data
- NO "gated plans", must be voluntary – cannot make participation mandatory to enroll in health insurance
- NO "de minimus" incentives – must count them toward the 30% limit, even if hard to value

Federal Regulators – Nondiscrimination Rules

- HHS nondiscrimination regulation finalized
  - Covers areas of gender equity and communications with individuals of limited English proficiency
    - Intent to reach plans through regulation of TPAs

- ERIC expressed significant concern over regulatory overreach and “side-door” regulation of self-insured plans

HHS Nondiscrimination Regs: Key Takeaways & Changes

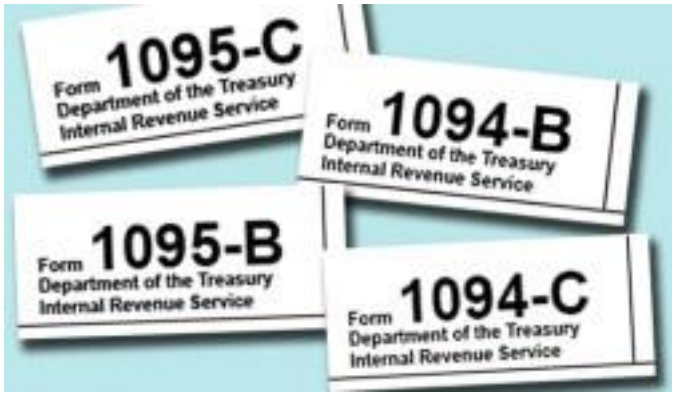
- Self-insured plans ARE covered, because of TPAs in exchanges
- No specific benefit mandates, but plan cannot be “discriminatory” or have a disparate impact
- If plan design is discriminatory, HHS will refer complaints to EEOC, but if the complaint is about the administration of the plan, HHS will pursue TPA
- Effective 01/01/2017, no “good faith compliance” safe harbor
- Compliance requires meeting all the notice requirements and language requirements, regardless of other requirements in other statutes or provisions
- Plans talking to TPAs to ensure compliance

Federal Regulators – Cadillac Tax

- Status of regs unclear after delay of tax
  - Prioritization by IRS/Treasury???
  - Work on issues continues:
    - Exclusion of onsite medical clinics
    - Actuarial value vs. Dollar amount
    - Indexing: CPI vs. medical inflation
    - Exclude HSA contributions from excise tax
    - Exclude retiree health from calculation

Federal Regulators – Reporting Requirements

- ACA reporting under IRC 6055 and 6056
  - Massive compliance burden for employers; audit tool for IRS
  - Delay of requirements sought and achieved by ERIC was helpful
  - IRS: No more delays. But considering changes to make it easier for employers to comply



Federal Regulators – ACA Regs Almost Done?

- Regulations to implement ACA have largely been completed
- Congressional and legal oversight continue

4) Impact of the November election

- Sec. Clinton: Double down on ACA, lower OOP caps, new refundable tax credits, improve transparency, fight consolidation
  - Create a public option, many new mandates on employers
- Mr. Trump: Expand HSAs, allow interstate purchasing.
  - Allow individuals to fully deduct health insurance premiums
- Sen. Sanders and Sec. Clinton both have numerous proposals aimed at cracking down on the costs of prescription drugs
  - Includes negotiations, re-importation, rebates, patent reform
- Mr. Trump has called for Medicare to negotiate the rate of prescription drugs, and supports re-importation
- Sen. Sanders: Medicare-for-All
  - Employers would pay taxes to support, but otherwise uninvolved

What Does Speaker Ryan Want?

EVEN MORE on 2016 Presidential Politics – Is this even going to matter?

- Republican candidates say they will repeal the ACA. Is this realistic?
  - Can Republicans hold on to the Senate?
  - Can they achieve the critical 60-vote Senate filibuster-proof threshold?
  - If a Democrat wins the White House, can Republicans produce the 67 votes needed to overcome a presidential veto?
- Can the House or Senate reach agreement on anything, alone or together?
- Is any of this realistic?

Control of U.S. Senate?

- Republicans currently control the Senate with 54 seats
  - Many more Republicans are up for re-election in 2016 than Democrats (reverse in 2018)
- Most talked about ten “vulnerable” incumbents from these states:
- **Illinois:** Sen. Mark Kirk (R)
- **Wisconsin:** Sen. Ron Johnson (R)
- **Florida:** Retiring Sen. Marco Rubio (R)
- **New Hampshire:** Sen. Kelly Ayotte (R)
- **Pennsylvania:** Sen. Pat Toomey (R)
- **Ohio:** Sen. Rob Portman (R)
- **Nevada:** Retiring Senate Democratic Leader Harry Reid (D)
- **North Carolina:** Sen. Richard Burr (R) .
- **Arizona:** Sen. John McCain (R)
- **Missouri:** Sen. Roy Blunt (R)

5) Trending Issues – State and Local Activity

- States and localities are getting increasingly aggressive adopting policies that impact employers and employer-sponsored health coverage
- Creates challenges especially for employers with workers in more than one state
- New *Health Affairs* article advises states on what they can do to control health care costs. The authors are influential including Zeke Emanuel and others from Center for American Progress

Trending Issues – State health reform efforts

1) Establish a "cost growth goal" – MA, MD, RI close
2) Publish a health and cost outcomes scorecard
3) Adopt payment and delivery system reform goals (fed waivers)
4) Implement bundled payments for all payers – AR
5) Institute global budgets for hospitals –MD saved $100m 1st year
6) Launch all-payer claims databases – 18 states
7) Expand evidence-based home visiting services

Trending Issues – State health reform efforts (2)

8) Improve price transparency

9) Integrate behavioral health and primary care – OR

10) Combat addiction to Rx

11) Improve delivery of long term care

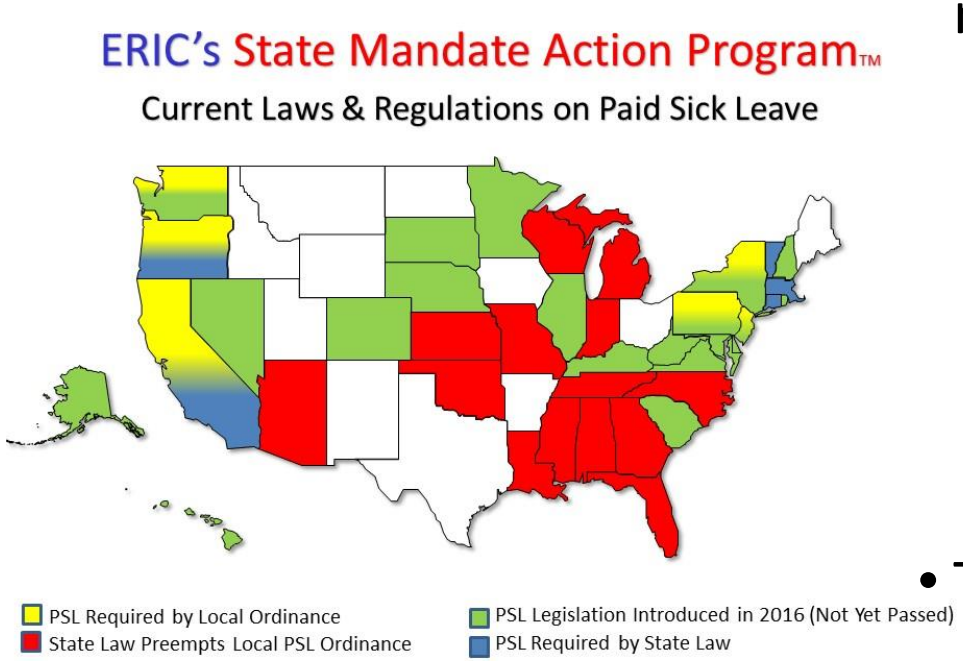
12) Align scope of practice with community needs

13) Institute reference pricing in state employee plan – CA

14) Expand the use of telehealth

15) Decrease unnecessary emergency room use

Trending Issues – Conflicting state laws

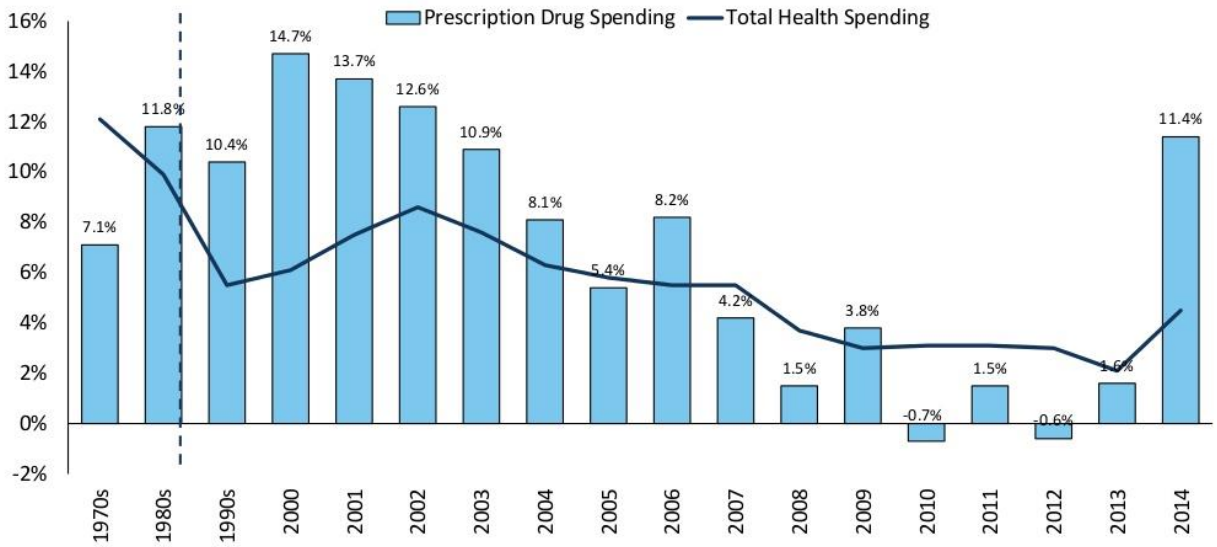


- Employers are being forced to confront a maze of state and local requirements
  - Paid leave (sick, parental)
  - Minimum wage
  - Vaccine mandates
  - Telemedicine
  - Biosimilar rules
  - Domestic partners
- This is just the tip of the iceberg.
  - Compliance is costly, difficult

Trending Issues – Prescription Drug Costs

After several years of modest growth, prescription drug spending rose sharply in 2014

Average annual growth rate of prescription drug spending per capita for 1970's – 1990's;
Annual change in actual prescription drug spending per capita 2000 – 2014



Source: Kaiser Family Foundation analysis of National Health Expenditure (NHE) Historical (1960-2014) data from Centers for Medicare and Medicaid Services, Office of the Actuary, National Health Statistics Group (Accessed on December 7, 2015)

Trending Issues – Prescription Drug Costs

- What is the cause of increasing prices?
  - Insurers and pharmaceutical companies do not agree
  - R&D is often cited, but costs for drugs that are decades old are also increasing rapidly

- This is causing states to consider action, which could have unpredictable consequences.
  - California and Ohio ballot initiatives: state to pay VA rates

Trending Issues – Prescription Drug Costs

- Cost of prescription drugs
  - Increase 2014-2015: 13.6%
    - Increase since 2001: 9.4% / yr
    - Increase in other HCR costs since 2001: 7.7% / yr
  - Rx costs 2015 = 15.9% of employer HCR spending
  - Specialty drug costs 2015 = 1/3 of prescription drug costs
    - 2nd highest cost driver after high cost claimants

- Dramatic price increases garner attention
  - Valeant – heart drugs increased by 212% and 525%
  - Turing Pharmaceuticals – raised price of Daraprim (for toxoplasmosis) from $13.50 to $750 per tablet
  - Rodelis Therapeutics raised price for 30 capsules of Cycloserine (for TB) from $500 to $10,800

Trending Issues – Prescription Drug Costs

- CSRxP: Major employers, insurers, hospitals, consumers
- New list of policy proposals:
  - **Transparency:** Release details of drug unit prices, report on drug list prices, disclose drug R&D costs
  - **Competition:** Faster generics, FDA incentives for competition, increase post-market surveillance, strict scrutiny of "new" drug applications, require sale of risky branded drugs to generic manufacturers, promote biosimilars
  - **Value:** Increase funding for public/private research, require pharma to conduct comparative effectiveness research, expand value-based pricing in public programs
- Bold proposals that will be heard and seriously considered on Capitol Hill

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Trending Issues – Prescription Drug Costs

- Recent CAP Briefing – CAP may be the most influential D think tank

Center for American Progress Action Fund

- Rep. Doggett made some major proposals on behalf of House D task force:
  - Medicare Rx price negotiations
  - Administration use “march in” rights to issue more patents
  - Invest more in PCORI and CER
  - Require FDA to compare new drugs to other drugs, not placebos
- This is a group that is **listened to** by Administration and Congressional Democrats

Rep. Lloyd Doggett (D-TX)

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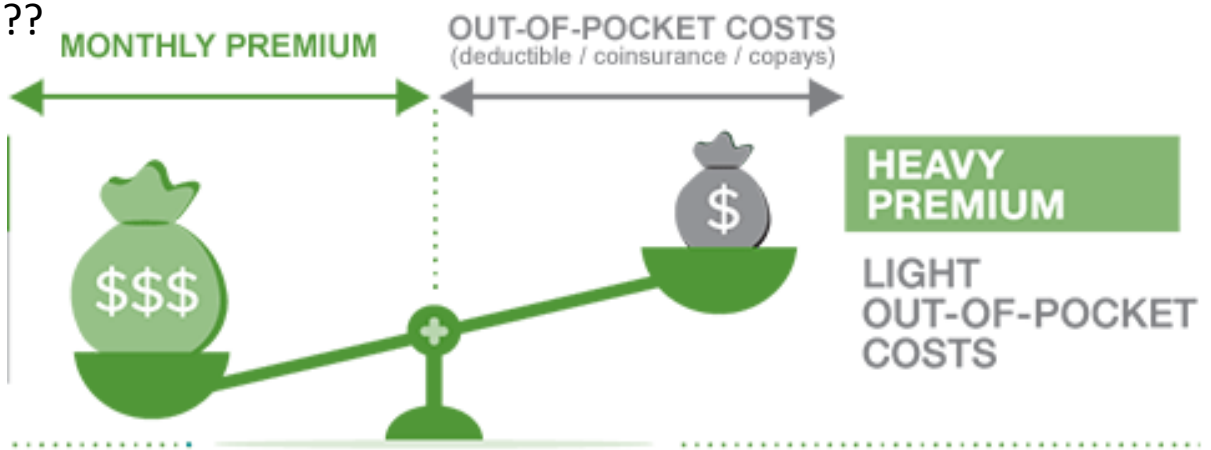
Trending Issues – Employee Out-of-Pocket Costs

- Cost-sharing
  - Employers pay 58% of total healthcare cost in 2015
    - Employee share rose from 40.6% in 2010 to 42.5% in 2015
  - Kaiser survey: since 2010, deductibles for all workers have risen 3 times as fast as premiums and 7 times as fast as wages
  - Will government attempt to regulate coinsurance, co-pays, and deductibles?
    - Impact on premiums???



Trending Issues - Discouraging themes

- Shifting more burdens to employers
  - ACA reporting
- Micromanagement
  - Counting employees for shared responsibility purposes
- Regulations re-creating the wheel
  - HHS Controlling Health Plans vs. ERISA
  - EEOC attack on ACA-vetted wellness programs
- Regulations to serve societal good
  - OOP
  - New HHS approach to non-discrimination

6) What are Employers Doing About this?

- Taking note of trends
- Analyzing and considering the rules being developed
- Raising concerns about the implications on employer coverage, the health system and plan beneficiaries
- Comparing notes with fellow employers
- Identifying better approaches for rules being considered or for current law
- Joining forces with fellow employers and trade groups like ERIC that lobby for changes on the federal or state level
- Employers can influence the debate without their own lobbyists and without media attention

What are Employers Doing About this?

- All interest groups are represented and zealously advocate to protect or advance their businesses
  - "Special interests?"
- Employers need to look out for each other and their role sponsoring health plans for workers, retirees and families
- Employers affected across every industry sector – diversity strength
- Policymakers need to hear how employer sponsorship of health plans adds value:
  - Drives innovations, improvements to quality, reduced costs and a healthier population
- If employers don't speak up, then policymakers won't know we care

Comply and Complain -- not an effective strategy

Contact Information

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About ERIC

ERIC is the only national trade association advocating solely for the employee benefit and compensation interests of the country's largest employers. ERIC supports the ability of its large employer members to tailor retirement, health, and compensation benefits for millions of workers, retirees, and their families. ERIC's members provide comprehensive health and retirement benefits to millions of active and retired workers and their families.