

# Preparing for the Trump Administration – What Employers May Expect

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February 16, 2017



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# Agenda

Equal Employment Opportunity  
Commission (EEOC)



Department of Labor (FLSA, OSHA)  
Regulations and Enforcement



Benefits – Repealing and Replacing  
the ACA

# Equal Employment Opportunity Commission (EEOC)

Chrys Martin  
Davis Wright Tremaine

# EEOC: What to Watch for



- Commissioners
  - New Republican Appointee/Republican Chair
  - Priorities
- General Counsel
  - Litigation/Enforcement
  - New General Counsel - Republican
- Budget
  - Staffing
- Local Focus

# EEOC's Current Strategic Enforcement Plan

- 1 Eliminating barriers in recruitment and hiring.
- 2 Protecting immigrant, migrant and other vulnerable workers.
- 3 Addressing emerging and developing issues.
- 4 Enforcing equal pay laws.
- 5 Preserving access to the legal system.
- 6 Preventing harassment through systemic enforcement and targeted outreach.

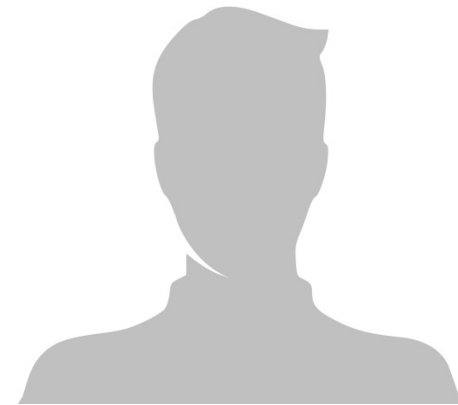
# General Counsel

Former



David Lopez

2017



???

# EEOC – What to Watch for

## Takeaways

- Charge-based agency; statutes unchanged
- Some priorities will remain in place
  - Harassment
    - Sex, religion and national origin
  - Sexual orientation and identity
    - Agency unchanged; courts may dictate
- Possibly more business friendly?
  - Leave as an accommodation
  - EEO-1 form?



# Victoria Lipnic – What to Watch for

- New Chair Victoria Lipnic’s message has been that the key words in EEOC are “Employment Opportunity”

Equal

Employment

Opportunity

Commission



# USDOL Regulations and Enforcement

# U.S. Department of Labor



29 agencies, including the following:

- OSHA (Occupational Safety and Health Administration)
- WHD (Wage and Hour Division)
- OFCCP (Office of Federal Contract Compliance Program)
- BLS (Bureau of Labor Statistics)
- PBGC (Pension Benefit Guaranty Corporation)
- ETA (Employment and Training Administration)
- OLMS (Office of Labor-Management Standards)
- OWCP (Office of Workers Compensation Programs)

# Secretary of Labor

Former



Thomas E. Perez

Trump Nominee



Alexander Acosta

# Congressional Leadership

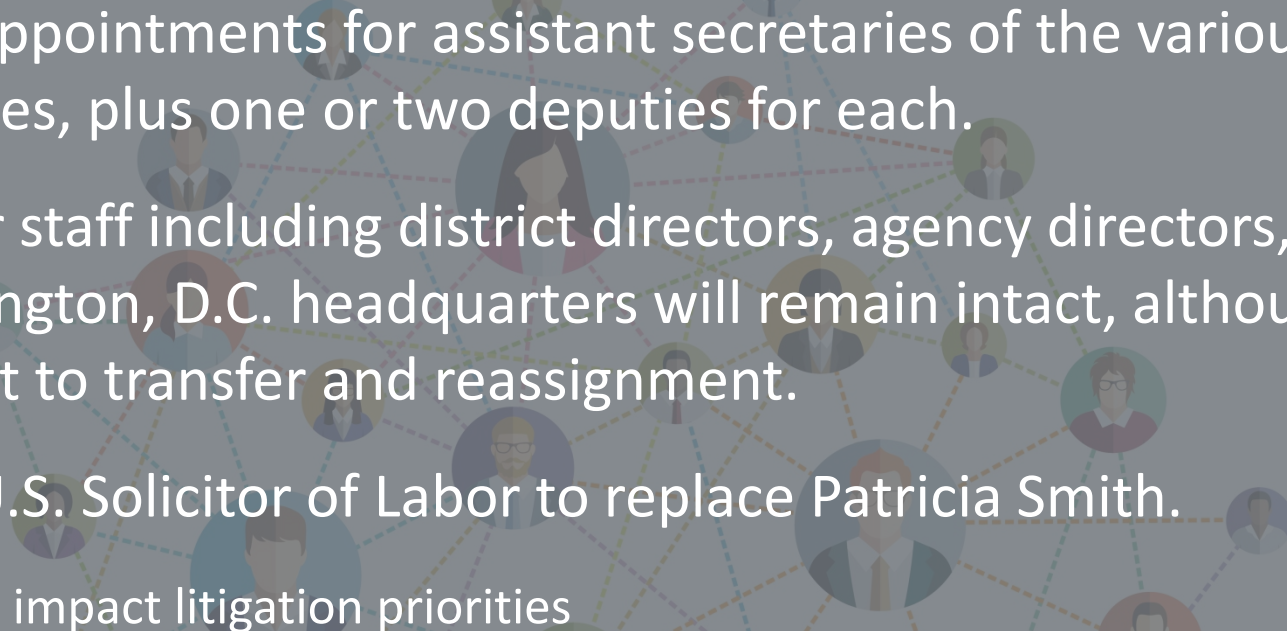
## U.S. Senate – Health, Employment, Labor, and Pensions Committee

- 12 Republicans; 11 Democrats
- Chair: Lamar Alexander (R – TN)
- Ranking member: Patty Murray (D - WA)

## U.S. House – Education and the Workforce

- Subcommittee on Health, Employment, Labor, and Pensions
  - 12 Republicans; 9 Democrats
  - Chair: Tim Walberg (R – MI)
  - Ranking Member: Gregorio Kilili Camacho Sablan (D – Northern Mariana Islands)
- Subcommittee on Workforce Protections
  - 9 Republicans; 7 Democrats

# Trump DOL – Personnel Changes

- 
- New appointments for assistant secretaries of the various agencies, plus one or two deputies for each.
  - Career staff including district directors, agency directors, and Washington, D.C. headquarters will remain intact, although subject to transfer and reassignment.
  - New U.S. Solicitor of Labor to replace Patricia Smith.
    - Will impact litigation priorities

# Trump DOL - Enforcement

## Emphasis:

- More education and outreach; less egregious penalties, liquidated (double) damages, and civil monetary penalties (CMPs).

## Inspections:

- Frequency and number will depend on size of budget. Typically, Republican administrations slow or freeze the rate of growth, not dramatic cutbacks from status quo.

## Litigation:

- Depending on budget, USDOL lawsuits will likely plateau; however, private lawsuits, including collective/class actions (state and federal), will continue to grow.

# Trump DOL – Anticipated Rule Changes

- Statutes and regulations will largely remain the same
- Anticipated changes:
  - FLSA white collar exemption regulation
  - USDOL “persuader” rule
  - Joint employer theory; independent contractor issue
  - “Blacklisting” E.O. (federal contractors)



# Trump DOL - Potential Rule Changes

- Federal Minimum Wage?
- Workplace Violence in Healthcare?
- Jobless Statistics?
- Prevailing Wage?





# State and Local Laws



- States and municipalities have dramatically increased and expanded laws regarding minimum wage, paid sick leave laws, scheduling requirements, safety and health regulations, joint employer coverage, and other issues that USDOL traditionally regulates.
- Expect state and local government, particularly on the two coasts, to continue actively expanding state and local law.

# Federal Judicial Appointments

- U.S. Supreme Court
  - Class Action Waivers
  - Agency Rule-making
  - Statutory Construction
- Circuit of Appeals and District Courts
  - More conservative justices on HR issues



# Benefits – Repealing and Replacing the ACA

Jennifer Chung  
Woodruff-Sawyer & Company

# Repealing the ACA – Sequence of Key Events

- **January 8, 2016** → Obama vetoes Congress's ACA repeal bill
- **January 20, 2017** → Trump is sworn into office
- **January 20, 2017 to April 23, 2017** → First 100 days of office
  - Congress and President expected to pass a budget reconciliation bill to repeal major provisions of the ACA
- **January 20, 2017** → Trump signed executive order “minimizing the economic burden of the PPACA pending repeal”
- **February 10, 2017** → Tom Price confirmed as Secretary of HHS

# Repealing the ACA – Trump’s 100 Day Action Plan

## 100-Day Action Plan to “Make America Great Again”

- Appoint new leadership for HHS and other key agencies with authority and responsibilities under the ACA
- Nominate new justice for the US Supreme Court
- Repeal and Replace ACA

# Repealing the ACA – Trump's 100 Day Action Plan

★ ★ ★ ★ ★

## Donald Trump's Contract with the American Voter

What follows is my **100-day action plan to Make America Great Again**. It is a contract between myself and the American voter—and begins with restoring honesty and accountability, and bringing change to Washington. On the first day of my term of office, my administration will immediately pursue the following:

### Six measures to clean up the corruption and special interest collusion in Washington, DC:

- ★ **FIRST**, propose a constitutional amendment to impose term limits on all members of Congress.
- ★ **SECOND**, a hiring freeze on all federal employees to reduce the federal workforce through attrition (exempting military, public safety, and public health).
- ★ **THIRD**, a requirement that for every new federal regulation, two existing regulations must be eliminated.
- ★ **FOURTH**, a five-year ban on White House and Congressional officials becoming lobbyists after they leave government service.
- ★ **FIFTH**, a lifetime ban on White House officials lobbying on behalf of a foreign government.
- ★ **SIXTH**, a complete ban on foreign lobbyists raising money for American elections.

### Seven actions to protect American workers:

- ★ **FIRST**, I will announce my intention to renegotiate NAFTA or withdraw from the deal under Article 2205.
- ★ **SECOND**, I will announce our withdrawal from the Trans-Pacific Partnership.
- ★ **THIRD**, I will direct the Secretary of the Treasury to label China a currency manipulator.



- ★ **FOURTH**, I will direct the Secretary of Commerce and U.S. Trade Representative to identify all foreign trading abuses that unfairly impact American workers and direct them to use every tool under American and international law to end those abuses immediately.
- ★ **FIFTH**, I will lift the restrictions on the production of \$50 trillion dollars' worth of job-producing American energy reserves, including shale, oil, natural gas and clean coal.
- ★ **SIXTH**, lift the Obama-Clinton roadblocks and allow vital energy infrastructure projects, like the Keystone Pipeline, to move forward.
- ★ **SEVENTH**, cancel billions in payments to U.N. climate change programs and use the money to fix America's water and environmental infrastructure.

### Five actions to restore security and the constitutional rule of law:

- ★ **FIRST**, cancel every unconstitutional executive action, memorandum and order issued by President Obama.
- ★ **SECOND**, begin the process of selecting a replacement for Justice Scalia from one of the 20 judges on my list, who will uphold and defend the U.S. Constitution.
- ★ **THIRD**, cancel all federal funding to sanctuary cities.
- ★ **FOURTH**, begin removing the more than two million criminal illegal immigrants from the country and cancel visas to foreign countries that won't take them back.
- ★ **FIFTH**, suspend immigration from terror-prone regions where vetting cannot safely occur. All vetting of people coming into our country will be considered "extreme vetting."

*continued on the back*

Donald J. Trump

Your signature

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*continued from the front*

★ ★ ★ ★ ★

I will work with Congress to introduce the following broader legislative measures and fight for their passage within the first 100 days of my Administration:

### Middle Class Tax Relief and Simplification Act

An economic plan designed to grow the economy 4% per year and create at least 25 million new jobs through massive tax reduction and simplification, in combination with trade reform, regulatory relief and lifting the restrictions on American energy. The largest tax reductions are for the middle class. A middle-class family with two children will get a 35% tax cut. The current number of brackets will be reduced from seven to three, and tax forms will likewise be greatly simplified. The business rate will be lowered from 35% to 15%, and the trillions of dollars of American corporate money overseas can now be brought back at a 10% rate.

### End the Offshoring Act

Establishes tariffs to discourage companies from laying off their workers in order to relocate in other countries and ship their products back to the U.S. tax-free.

### American Energy and Infrastructure Act

Leverages public-private partnerships, and private investments through tax incentives, to spur \$1 trillion in infrastructure investment over ten years. It is revenue neutral.

### School Choice and Education Opportunity Act

Redirects education dollars to give parents the right to send their kid to the public, private, charter, magnet, religious or home school of their choice. Ends Common Core and brings education supervision to local communities. It expands vocational and technical education, and makes two- and four-year college more affordable.

### Repeal and Replace Obamacare Act

Fully repeals Obamacare and replaces it with Health Savings Accounts, the ability to purchase health insurance across state lines and lets states manage Medicaid funds. Reforms will also include cutting the red tape at the FDA; there are over 4,000 drugs awaiting approval, and we especially want to speed the approval of life-saving medications.

### Affordable Childcare and Eldercare Act

Allows Americans to deduct childcare and eldercare from their taxes, incentivizes employers to provide on-site childcare services and creates tax-free dependent care savings accounts for both young and elderly dependents, with matching contributions for low-income families.

### End Illegal Immigration Act

Fully-funds the construction of a wall on our southern border with the full understanding that the country of Mexico will be reimbursing the United States for the full cost of such wall; establishes a two-year mandatory minimum federal prison sentence for illegally re-entering the U.S. after a previous deportation, and a five-year mandatory minimum federal prison sentence for illegally re-entering for those with felony convictions, multiple misdemeanor convictions or two or more prior deportations; also reforms visa rules to enhance penalties for overstaying and to ensure open jobs are offered to American workers first.

### Restoring Community Safety Act

Reduces surging crime, drugs and violence by creating a task force on violent crime and increasing funding for programs that train and assist local police; increases resources for federal law enforcement agencies and federal prosecutors to dismantle criminal gangs and put violent offenders behind bars.

### Restoring National Security Act

Rebuilds our military by eliminating the defense sequester and expanding military investment; provides veterans with the ability to receive public VA treatment or attend the private doctor of their choice; protects our vital infrastructure from cyber-attack; establishes new screening procedures for immigration to ensure those who are admitted to our country support our people and our values.

### Clean Up Corruption in Washington Act

Enacts new ethics reforms to drain the swamp and reduce the corrupting influence of special interests on our politics.

On November 8th, Americans will be voting for this 100-day plan to restore prosperity to our economy, security to our communities and honesty to our government.

**This is my pledge to you.**

And if we follow these steps, we will once more have a government of, by and for the people.

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# Repealing the ACA – Trump’s 100 Day Action Plan

## **Repeal and Replace Obamacare Act**

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# Budget Reconciliation Bill

## How Could the ACA be Repealed?

- Senate does not have a 60% majority to be filibuster proof
- Budget reconciliation bill can repeal certain ACA provisions
  - Only needs a simple majority (51 votes) to pass
- Can only include provisions that impact the federal budget
  - E.g., ACA-related tax credits, subsidies and penalties



# Budget Reconciliation Bill

## What Could Be Repealed Via Budget Reconciliation

- Individual and Employer Shared Responsibility Mandates
- 40% excise tax on “rich” plans (a.k.a. the “Cadillac Tax”)
- The Marketplace exchanges (run or facilitated by the federal government)
- Phasing out subsidies for individual Marketplace coverage
- Phasing out Medicaid expansion for lower income individuals
- Prohibition on certain tax-free reimbursements of OTC medication
- Current \$2,600 annual cap on Health FSAs

# Budget Reconciliation Bill

## What Cannot Be Repealed Via Budget Reconciliation

- Prohibition on pre-existing condition exclusions
- Dependent children eligibility up to age 26
- Limit on excessive waiting periods (> 90 days)
- Prohibition on annual and lifetime limits on EHBs
- Anti-rescission provision
- Appeals process and external review requirements
- Free (in-network) preventive health services
- ACA reporting requirements

# Marketplace Coverage Statistics

## Marketplace Coverage

- 20 million formerly uninsured people have gained coverage because of the ACA
  - Per former HHS Secretary, Sylvia Burwell (<http://wayback.archive-it.org/3926/20170127190440/https://www.hhs.gov/about/news/2016/03/03/20-million-people-have-gained-health-insurance-coverage-because-affordable-care-act-new-estimates>)
- Vast majority of marketplace enrollees (83%) receive a federal subsidy
  - Based on enrollment as of March 2014 per Kaiser Family Foundation report <http://kff.org/health-reform/issue-brief/how-much-financial-assistance-are-people-receiving-under-the-affordable-care-act/>
- Federally run or facilitated marketplace exchanges expected to be phased out over next 1-2 years of an ACA repeal

# Employer Based Coverage Statistics

## Employer Based Coverage Statistics

- 2016 Employer Health Benefits Survey by Kaiser Family Foundation
  - 270.2 million non-elderly people in America
  - 55.5% of whom are covered through employer sponsored health plans
  - 150 million non-elderly people covered
  - <http://kff.org/report-section/ehbs-2016-summary-of-findings//> (dated September 14, 2016)
- Tax exclusion for premiums is one of two of the largest portion of the health insurance associated “federal subsidies” (~41%)
  - Federal spending for Medicaid and CHIP is the other (~43%)
  - Compared with 10% for subsidies for marketplace coverage
  - <https://www.cbo.gov/publication/51385>

# Equally Divided Poll on ACA Repeal

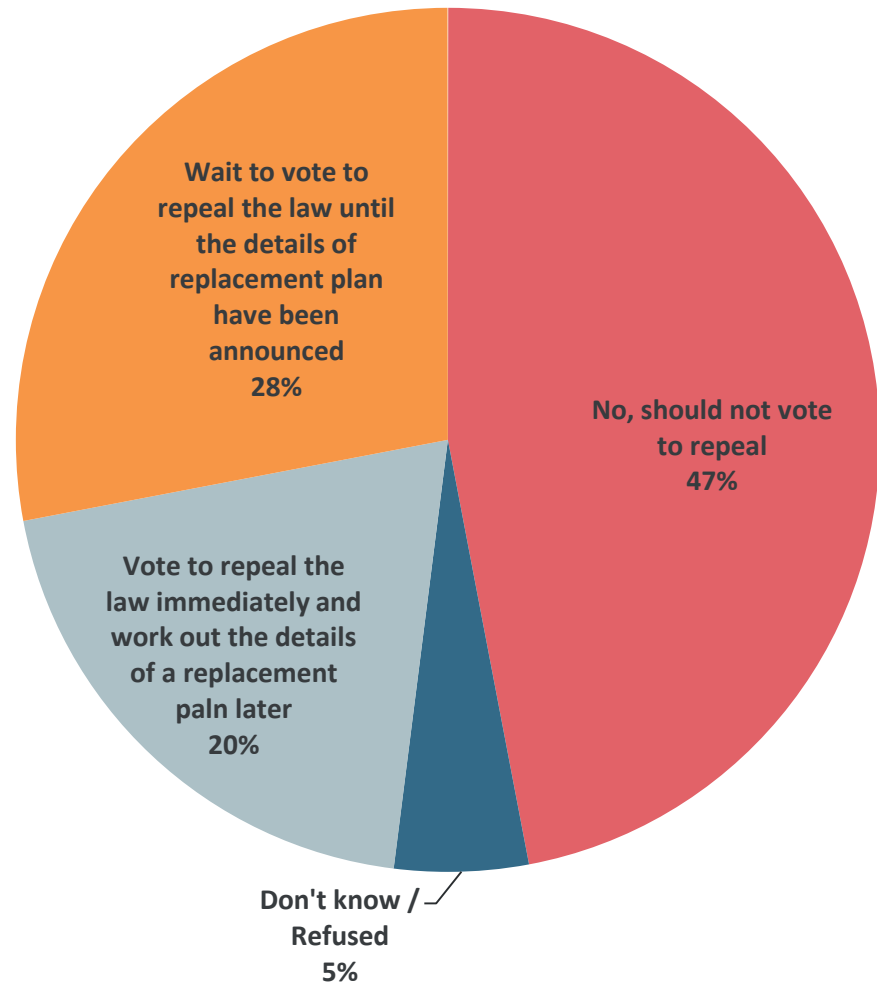
## Public Opinion on Repealing and Replacing the ACA

- Kaiser Family Foundation Health Tracking Poll:
  - 49% want lawmakers to repeal
    - 20% want to repeal now and work out details of replacement plan later
    - 28% want to wait on repeal until details of replacement plan are announced
  - 47% don't want lawmakers to repeal
  - 5% don't know or declined to answer
  - <http://kff.org/health-costs/poll-finding/kaiser-health-tracking-poll-health-care-priorities-for-2017//> (poll conducted December 2016)

# Public Opinion Chart

## KFF Health Tracking Poll

December 2016



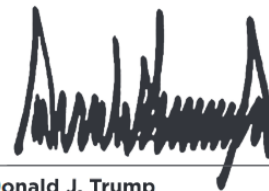
# Trump 100-Day Action Plan

## Trump's 100-Day Action Plan

- Replace ACA with HSAs
- Allow purchase of insurance across state lines
- Let states manage Medicaid

### Repeal and Replace Obamacare Act

Fully repeals Obamacare and replaces it with Health Savings Accounts, the ability to purchase health insurance across state lines and lets states manage Medicaid funds. Reforms will also include cutting the red tape at the FDA: there are over 4,000 drugs awaiting approval, and we especially want to speed the approval of life-saving medications.



Donald J. Trump

# Ryan's "A Better Way" Plan

## Speaker of the House Paul Ryan's "A Better Way" Plan

- Increase the role and availability of HSAs
- Refundable tax credits to buy insurance (increases with age)
- Permit higher wellness plan incentives (keep EEOC out of it)
- Permit employers to adopt standalone HRAs and other employer payment plans
- Allow small employers and individuals to band together into new pools for purchasing power (MEWA rules?)
- Allow policies to be purchased across state lines





# Ryan's "A Better Way" Plan

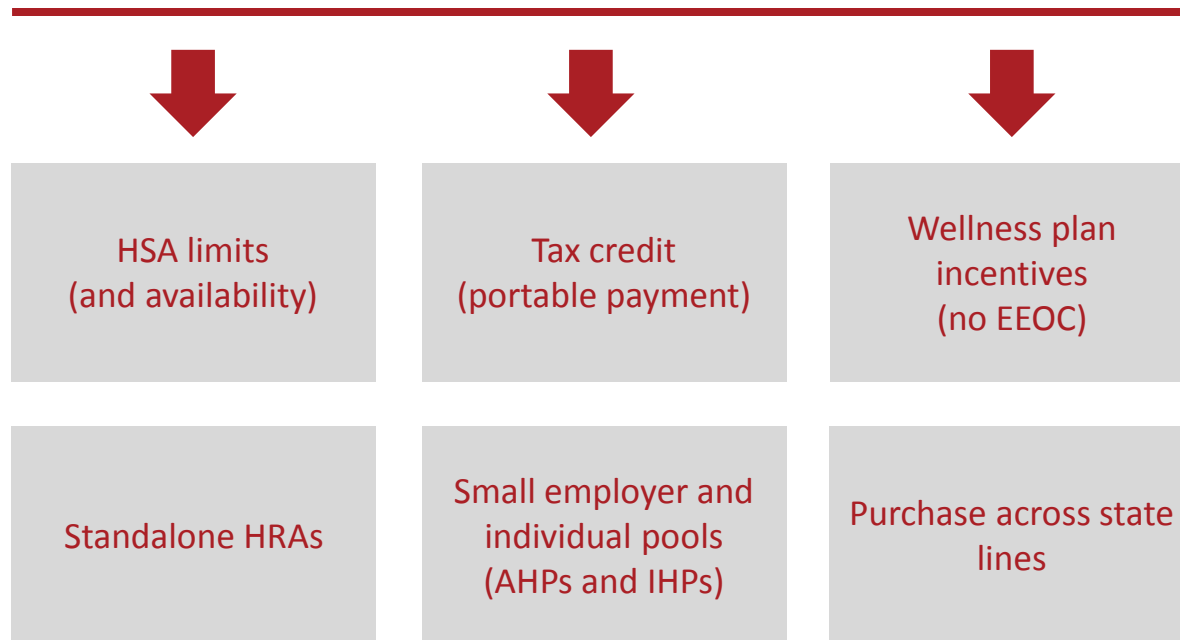
## Speaker of the House Paul Ryan's "A Better Way" Plan

- Cap the pre-tax treatment for contributions under employer sponsored plans
- One time open enrollment and then continuous coverage clause (instead of prohibition on pre-existing conditions)
- Help fund high-risk pools (~25B)
- Cap Medicaid funding (states can choose either enrollment based amount or a block grant)

# Ryan's "A Better Way" Plan

## Speaker of the House Paul Ryan's "A Better Way" Plan

### Increases and New Allowances



# Ryan's "A Better Way" Plan

## Speaker of the House Paul Ryan's "A Better Way" Plan

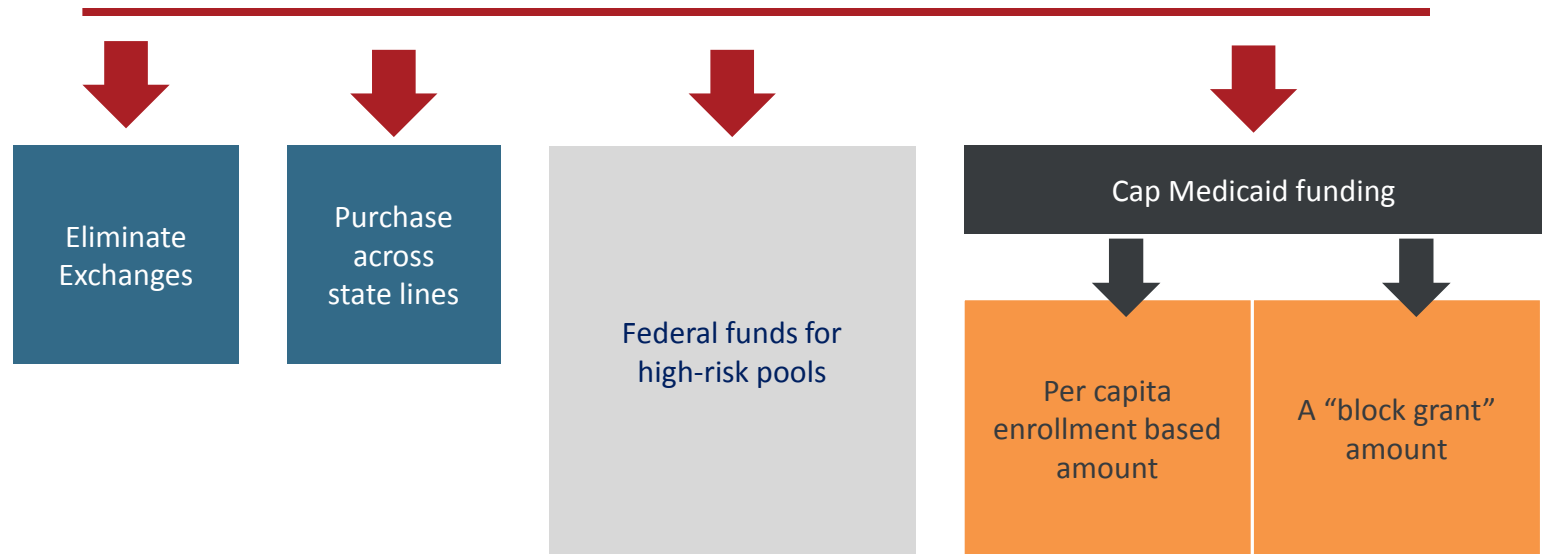
### Decreases and New Limitations



# Ryan's "A Better Way" Plan

## Speaker of the House Paul Ryan's "A Better Way" Plan

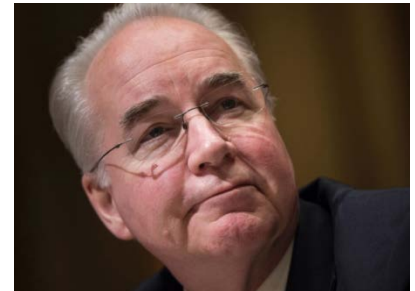
### Affecting States



# Price's "Empowering Patients First"

## HHS Secretary Tom Price's "Empowering Patients First"

- Provide refundable tax credit to purchase own insurance (starts at \$1,200, up to \$3,000 based on age)
  - Not available if receiving employer coverage, Medicaid, Medicare, TRICARE
- Refundable tax credit for HSA contributions (even for Medicare participants)
- Increase HIPAA wellness plan incentives to 50% of coverage cost
- Move away from DB towards DC system



# Price's "Empowering Patients First"

## HHS Secretary Tom Price's "Empowering Patients First"

- No prohibition against exclusions for pre-existing conditions
  - Guaranteed issue if had 18 months of continuous coverage
  - If not, then higher premiums can be charged (150% for 3 years), and
  - Coverage for pre-existing conditions can be excluded for 18 months
- Cap employer's deduction for premiums at \$8,000/individual or \$20,000/family
- Provide states with funds to create high risk pools (~\$3B)
- Purchase policies across state lines

# Steps Already Taken

## The CURES Act

- Removes qualified small employer HRAs from the definition of GHP under ACA
  - HRA can be standalone without violating ACA
- Requirements
  - Must be 100% employer funded,
  - Made available to all eligible employees on same terms, and
  - Contribution cannot exceed \$4,950/\$10,000

# Steps Already Taken

## Executive Order Minimizing the Economic Burden of the ACA

Directs HHS and other departments/agencies with ACA authority to:

- Waive, defer, grant exemptions from or delay any provision/requirement that
  - Imposes a fiscal burden on any State or cost, fee, tax penalty or regulatory burden on
    - individuals, families, patients, recipients of health care services, purchasers of health insurance
    - health care providers, health insurers, or makers of medical devices, products or medications



# Steps Already Taken

## Trump's Executive Order (continued)

- Provide greater flexibility to states and cooperate with them in implementing healthcare programs
- Encourage development of a free and open market in interstate commerce
- If complying would require revisions of regulations, agencies shall comply with the Administrative Procedure Act

# Takeaways

## Key Takeaways

- Full scale repeal and reform of the ACA not likely until 2018
- Tax reform is a high priority – replacement plan will likely boost availability of HSAs/HRAs but limit the tax exclusion of premiums
- Regulatory relief cannot be granted via an executive order
- Administrative process to change regulations can be a lengthy process
- Even with Trump's executive order, it's uncertain whether penalties/assessments for prior years will be waived
- Employers should continue to comply with the current ACA regulations

# Questions?

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