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Obama Win To Unleash Onslaught Of ACA Regulations

By **Rachel Slajda**

Law360, New York (November 06, 2012, 12:00 AM ET) -- President Barack Obama's re-election is sure to galvanize the administration to push ahead on implementing the Affordable Care Act, with experts predicting a slew of regulations released in the coming weeks in a scramble to get the act's biggest features in place for their 2014 debut.

The Obama administration has maintained a pre-election quiet on many outstanding ACA regulations, such as details about the employer mandate and essential health benefits. With the election over and the political prerogative of not ruffling too many feathers gone, expect to see many of these regulations issued, along with more guidance on major state-based aspects of the ACA, like the insurance exchanges and the Medicaid expansion.

"We'll see a burst of implementation activity right after the election, and the release of pent-up regulations," said Eric Zimmerman, co-chair of McDermott Will & Emery LLP's life sciences government strategies team. "Why stir controversy [before the election]?"

State governors and Medicaid directors have been asking the administration for more information on the exchanges and expansion for months, with few concrete answers. On Medicaid, one of the most pressing questions is whether states can extend coverage to less than 138 percent of the poverty line and still get the 100 percent federal match.

On the exchanges, rules on major issues like essential health benefits, as well as details about how the federally operated exchanges will work, have also been in high demand.

Along with formal regulations, experts expect to see many more details about these elements released in the coming weeks. That means a lot more certainty for hospitals and other health care providers, which experts say has been sorely needed.

"It's been really tough to develop and pursue strategies toward reform, given the great uncertainties," Zimmerman said, citing this June's U.S. Supreme Court decision as well as the outcome of the election. "It really slows progress. It's difficult to chart a course."

In the same vein, expect some of the states that have been holding out on implementation until after the election to begin falling into line. Even opposing states have been quietly laying some of the groundwork for insurance exchanges and Medicaid expansion, applying for and accepting federal grants. Now that the law is clearly here to stay, many believe these states will begin working more purposefully, and more publicly, toward compliance.

"Once the politics clear, most states will conclude that expanding Medicaid to 138 percent of the poverty line is a good move," said Deborah Bachrach, special counsel at Manatt Phelps & Phillips LLP and former Medicaid director for New York.

One thing to look for is whether Obama's relatively accommodating approach — judiciously granting waivers and leaving many of the essential questions about benefits and exchange structures up to the states — continues in his second term.

If the administration sees Obama's victory as a mandate to press forward on health reform, the U.S. Department of Health and Human Services could begin leaning harder on the states, some say.

But HHS is aware that opposition to the ACA has been rooted in the idea of a “federal takeover” of the health care sector, and it has an interest in offering states a strong hand in how reform plays out within their borders.

In particular, the feds could grant grace periods for states that will have trouble meeting ACA deadlines because their leaders insisted on waiting first until after the Supreme Court decision, then until after the election, to begin significant work.

“They don't want to be seen as commandeering,” said I. Glenn Cohen, co-director of the Petrie-Flom Center for Health Law Policy, Biotechnology and Bioethics at Harvard Law School.

Although Obama's win brings much more certainty to the health care landscape, questions still remain. When Congress reconvenes for its lame-duck session, lawmakers are expected to begin considering major deficit reduction. It's unlikely that providers will escape this round of belt-tightening, anticipated to extend into 2013.

“Medicare and Medicaid are always on the table for deficit reduction,” Bachrach said. “The question has always been, 'How do you constrain spending growth without undermining coverage goals?’”

In the long term, experts predict the ACA will continue to move forward with tweaks but few major changes. The administration has already been open to repealing elements here and there. In October 2011, for example, HHS announced it would drop a long-term care insurance program. And in April 2011, Obama signed a law repealing one of the ACA's business tax provisions.

One provision that could see some changes is the Independent Payment Advisory Board, or IPAB, which has been battered by lawmakers on both sides of the aisle. The IPAB is designed to force Congress to take action on controlling the growth of Medicare spending. If the growth rate exceeds a certain target, a 15-member IPAB will be established to make recommendations on how to bring the rate back down. If Congress doesn't act on its recommendations, either by adopting them or by passing legislation that has the same fiscal effect, HHS Secretary Kathleen Sebelius can implement them unilaterally.

Although Obama has stood strong in support of IPAB, it doesn't sit well with many members of Congress, both Democratic and Republican. The IPAB has been called a “rationing board” and an overstepping of executive branch authority. A House bill to repeal it would likely have garnered significant Democratic votes this March, if Republicans had not attached malpractice reform to the legislation.

The IPAB is a “frightening concept” for Congress, said Stephen Weiner, chair of the health law section at Mintz Levin Cohn Ferris Glovsky & Popeo PC. “It's an easy target.”

Many health policy experts say cost control is the next, crucial phase of health reform. In Massachusetts this year, for example, the state enacted a major bill aimed at cutting \$200 billion from health spending, which it touted as the next step in its reform efforts.

But after the fighting over the ACA took up nearly all of his first term, Obama is not likely to pursue other significant health legislation in his second, experts say.

"Health reform is relatively radioactive," Cohen said.

--Editing by Kat Laskowski.

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