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- HEALTHCARE AND THE PRESIDENTIAL CANDIDATES' POSITIONS
- GENETIC NONDISCRIMINATION ACT

Healthcare and the Presidential Candidates' Positions

As the Presidential election draws near, we all have concerns regarding the candidates' positions regarding health coverage and the benefits systems. The July 11, 2008 SPBA Update included "*Personal observations from SPBA President Fred Hunt*". Excerpts from that article follow.

Obama & McCain Health Reform Proposals.....and what you need to be doing

When you hear people proclaiming their love or hate for what one or the other candidate will do for health coverage, it is mostly supposition. The devil is in the details, and there are very few. Even after the Inauguration, official ideas may be very different from what actually happens. So, the key to success in the next 12-18 months is to keep a cool head and a professional reality-based perspective. Reading below will raise dozens of questions of what specifically it means and how it would work. Sorry; that's the prerogative of politics, they can be vague. YOU need to be an educator for the general public, your local media, and elected representatives & candidates of all parties.

A troubling issue is that both presidential candidates and all politicians use the word "insurance". Do they know self-funding exists? Are they using "insurance" as just a handy word meaning both? Would they carelessly write laws saying "insurance" which regulators would interpret as only allowing fully-insured policies? Every Congressman & candidate needs to constantly be educated that self-funding is the largest source of employee health benefits (much larger than fully-insured), and that Congress wisely created ERISA as what is still the ultimate consumer protection law to regulate self-funded employee benefit health plans. **You need to explain that, and then ask if their use of the word "insurance" intends to kill this largest consumer-protection option for American's health coverage.** If you don't raise the issue, they won't know.

Both Obama & McCain would shake up the health coverage & benefits system, but neither would destroy the private employee

benefits system (unless by unknowing accident). **The main differences are that McCain would shift to a more individual-based empowerment, whereas Obama would use a governmental approach.**

McCain

McCain would replace the current system of the cost of employee health coverage not being taxable income....to being taxable to workers. In place of that, there would be a \$2,500 refundable tax credit for individuals, \$5,000 for families, to pay for "insurance" premiums. Any unused credits (coverage costing less than those amounts) could be placed in an HSA account. Of course, this raises the question what he means by "insurance" and "premiums". Self-funded plans would need to designate a premium-equivalent amount per person & family (which you sort of do for COBRA now). For top-quality plans today (such as many unions have negotiated), this would already be a loss, because the annual per-person costs are already over \$2,500 or \$5,000 family. That means more taxes for big segments of workers. Also, would the numbers be indexed to medical inflation rates (which far exceed general inflation rates)?

The goal of shifting the taxation approach is to bring equality to people who have to buy their health coverage other than via an employer plan. This equal treatment has been an often-stated desire by both parties for 30 years, but usually gets torpedoed in the revenue committees of Congress, because it costs Uncle Sam money to give tax deductions (or, in this case, tax credits) to millions of people who currently buy their health coverage with after-tax dollars. **So, be aware that ANY of the ideas of either candidate for the government to "give" must be balanced by new or higher taxes elsewhere.**

The other goal of the tax shift and equality is to give workers more freedom to buy their health coverage wherever they would like. They would no longer be tied to the employer plan by the tax-free status the employer plan offers. **Will this shopping outside cause anti-selection spiral of employer plans of the young & healthy going else-**

where? Actually, experience has shown that employer plans have the ability to provide more value-added things to a health plan. So, teamed with a cutting-edge TPA, employer plans should retain their appeal.

McCain also proposes to work something with states to develop a plan to provide coverage to those who have been denied health insurance and/or with premium assistance for those whose incomes fall below certain levels. This approach raises suspicions. Why a 50 state approach? This actually sounds like the underlying logic of the Clinton 1993 state "pools", and a pet goal of Governors ever since.

Is McCain saying that Medicaid would simply be expanded for people denied coverage or needing premium assistance, or a parallel program in each state? With the apparent rip-offs by states of the Federal Medicaid payments, why would the government want to expand a flawed system?

In the practice of medicine, McCain would support tort reforms to shield doctors from lawsuits if they follow clinical guidelines and adhere to safety protocols. The intent to have lawsuits less a factor in the practice of medicine is admirable and has been much-sought. However, instead of fear of lawsuits, doctors would treat patients strictly by the guidelines, which would thwart many of the fast-moving innovations bringing medical progress today.

Obama

Obama proposes to create a national plan for those without employer-provided coverage, and federal subsidies would be available for lower-income to buy into this plan. Is this a totally new plan & bureaucracy? Why not simply allow these people to buy into the massive Federal employee plan ("the same plan as the Congress", as so many like to emotionally say); why not buy into Medicare or Medicaid??

Obama has a curious pay-or-play threat, that if employers that do not make a "meaningful" contribution to their employee benefit health coverage, they would be forced to pay an (undisclosed) percentage of payroll to the national plan described above. "Small" (no size given, and where the largest percent of uninsured are) employers would be exempt from the pay-or-play mandate.

This is full of questions. What is a "meaningful" contribution to avoid the payroll tax? Is the measure of meaningfulness per-person or total percent of payroll? This would be important if a significant percent of the workers were under other coverage for whatever reason. How high is the payroll penalty? Would the numbers be indexed to future medical inflation or other factors?

Obama seems to be proposing that Uncle Sam become the new tax-supported Stop-Loss provider. This is an idea that has popped up occasionally in Democrat Presidential proposals over the past 8 years, but is still as vague as ever, and seems to be a feel-good feature to let each set of players use their wishful thinking. Note: The private Stop-Loss community seems to have been surprisingly quiet (or very good under the radar) on expressing its views on this issue to the government and its customers.

Obama would mandate that all health plans extend coverage to employees' adult children up to age 25. It seems straightforward, but the use of the word "employee's" leaves some cynical question as to whether only employer-sponsored plans would be hit with this mandate. What about the new national plan; would children of those enrollees be forced to be offered coverage to age 25 too?

Obama would mandate that health plans provide the same coverage for mental disorders as other medical conditions. There has already been the federal Mental Health Parity law. It is not clear whether this overlaps or would become a vastly-expanded version.

As noted at the start, this outline is like forecasting in the fog, and both candidates seem to wander & waffle from campaign event to campaign event about precisely how they feel and what they would propose. That is good news! It means that there is the opportunity for constructive education. Neither candidate nor party wants to do something stupid or counter-productive. This is an equal-opportunity to share your expertise to steer the nation.

Genetic Nondiscrimination Act

The Genetic Information Nondiscrimination Act of 2008 (Public law No. 110-233) prohibits group health plans, issuers of individual health care policies and employers from discriminating on the basis of genetic information. The group health plan provisions of the Act will take effect for plan years that begin 12 months after the date the Act was signed into law (May 21, 2008).

Motivations for the law – The legislative history of the new law notes that recent advances in genetics have opened new opportunities for medical progress while at the same time these advances give rise to the potential misuses of genetic information in health insurance and employment. Congress found that Federal law addressing genetic discrimination was incomplete in both the scope and depth of its protections. While many States have enacted some type of genetic nondiscrimination law, these laws vary widely with respect to their approach, application, and level of protection. Congress found it necessary to establish a national and uniform basic standard to fully protect the public from discrimination and allay their concerns about the potential for discrimination, thereby allowing individuals to take advantage of genetic testing, technologies, research, and new therapies.

What is the impact on group health plans? The Health Insurance Portability and Accountability Act (HIPAA) already prohibits group health plans from discriminating against individuals and family members on the basis of genetic information. Consequently, most group plans are already complying with the requirements of the Genetic Information Nondiscrimination Act (GINA). However, the GINA, unlike HIPAA, does not allow an opt-out by non-federal governmental plans. *Caution: When DOL, Treasury and HHS begin analyzing the Act for the purposes of drafting regulations, they may see aspects of the Act that are broader in scope than HIPAA.*

Premiums and Contributions - The legislation amends ERISA, the IRS Code and the PHS Act (Public Health Service Act) to prevent group health plans and health insurers from adjusting contribution amounts or premiums on the basis of genetic information.

The term "genetic information" is defined broadly in the legislation; this raises some issues. Below is the definition.

The term "genetic information" means, with respect to any individual, information about

- (i) such individual's genetic tests,
- (ii) the genetic tests of family members of such individual, and
- (iii) the manifestation of a disease or disorder in family members of such individual.

The term "genetic information" includes participation in clinical research involving genetic services.

Genetic tests would include analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detect genotypes, mutations, or chromosomal changes.

The prohibitions on the use of genetic information extend to fetuses and embryos (for individuals utilizing assisted reproductive technology), as well as to dependents and family members (defined as first-degree, second-degree, third-degree, or fourth-degree).

Genetic Testing – Group health plans and health insurers may not request or require an individual or a family member of such individual to undergo a genetic test. However, plans and insurers are permitted to obtain and use the results of a genetic test when making payment determinations (HIPAA privacy minimum necessary rules apply).

Will requesting health history from employees as part of a group health plan's wellness program place the plan and employer at risk for violating this new law? This is one of the issues that will need to be addressed by the regulation drafters. There is an exception in the employment section of the GINA to the general prohibition on employers for requesting, requiring or purchasing genetic information about an employee or an employee's family member. This exception includes wellness programs, provided that the employer does not receive information that reveals specific information about individuals, but rather aggregate data. What this means for group health plans is unclear at this time.

Underwriting – Group health plans and health insurance issuers may not request, require or purchase genetic information for underwriting purposes. The term "underwriting" covers rules relating to the determination of eligibility for plan benefits or coverage, the computation of premium or contribution amounts, application of pre-existing condition exclusions and any activities relating to the creation, renewal, or replacement of health benefits or a health insurance contract. If an unintentional collection of genetic information occurs, the plan or insurer will not be found in violation provided that the information is not used to discriminate against an individual.

Individual Market – Insurers operating in the individual health insurance market are subject to similar prohibitions as those applying to group health plans.

Penalties – Penalties of \$100 per day per participant or beneficiary affected by a failure to comply apply to plan sponsors of

group health plan or insurers. If a failure to meet the bill's requirements is found on audit, the penalty would rise to \$2,500 per individual affected.

HIPAA Privacy – HHS is required to revise the HIPAA privacy regulations to provide that genetic information is treated as health information and to prohibit group health plans and insurance issuers from using or disclosing "protected health information" that is genetic information for underwriting purposes.