

BROOKINGS

Report

Repeal and replace Obamacare: what could it mean?

Stuart M Butler Wednesday, November 30, 2016

Donald Trump's pledge to "repeal and replace Obamacare" was one of his biggest crowd pleasers. It's been noted, of course, that "repeal and replacing" is easier said than done, and indeed the President-elect has already begun to fudge. But moving forward on his broad replacement themes—expanding health savings accounts (HSAs) and state flexibility—could lead to some surprising and intriguing reforms.

Some have argued that Trump could and should strike a devastating blow to the Affordable Care Act (ACA) on his first day in office. For instance, he could decide not to appeal the lower court ruling in House v Burwell. A federal district court has ruled that that money cannot be spent on cost-sharing subsidies because Congress has not appropriated the money. So dropping the appeal would mean the end of these payments. In similar vein, he might demand repayment from insurers of billions of dollars of transitional reinsurance payments, citing a recent General Accountability Office letter declaring that the Administration lacks the legal authority to reassign to health plans some funds intended by statute for the US Treasury's general fund.

Such first-day actions would destabilize the exchange plans, causing more insurers to withdraw and shredding the subsidy system. Even allowing a 1- or 2-year phase-out would gravely disrupt the exchange system. Yet the high cost of premiums and deductibles was the chief complaint about Obamacare among

Trump supporters. In addition, the Trump surge was strongest in counties characterized by poor health. These voters would be outraged by even higher out-of-pocket costs and fewer plans.

To avoid a backlash, repeal and replace must be a measured and slower process. That's true even if much, or all, of the restructuring could be accomplished through budget reconciliation, a budget process maneuver that would avoid a filibuster by Senate Democrats. Moreover, a replacement does not need to be nationally uniform. Republicans, long dismissive of "one-size-fits-all" solutions from Washington, should recognize that what will work in Texas and Utah may not be right for California and Massachusetts.

So, in broad terms, how might the stated themes of repeal and replace evolve?

Redesigning Subsidies

During the campaign, Trump supported the familiar Republican themes of tax-free HSAs and allowing families to deduct health insurance premiums in their tax-returns. He pledged that "we must also make sure that no one slips through the cracks simply because they cannot afford [health] insurance." Yet one assumes he must be well aware that tax deductions are of little use to most of his working-class supporters struggling to pay for coverage because they pay little or no federal income tax.

This reality opens the door to a serious and conceivably bipartisan discussion about how to replace the complex structure of ACA subsidies and tax breaks. Let's recall that many leading Republicans have in the past proposed tax credits for the purchase of health insurance, including "refundable" credits that are within the same species as ACA subsidies. These Republicans include Senate Finance Committee chairman Orrin Hatch (R, Utah), House Budget Committee chairman

and Trump nominee for Secretary of Health and Human Services, Tom Price (R, Georgia), and House Speaker Paul Ryan (R, Wisconsin). Many conservative health reformers call for that approach today.

Meanwhile a number of states (including Indiana while Vice President-elect Mike Pence was governor) sought and obtained waivers from the Obama Administration to use the Medicaid expansion funds under the ACA to craft consumer-driven subsidies for working families, including prefunding HSA accounts. Under a Trump administration, many red states could reverse themselves and agree to the Medicaid expansion and, with the Trump White House's blessing, combine the new Medicaid money with tax credits to finance subsidies to buy private insurance.

It's true that without more federal spending, which congressional conservatives will resist, it would still be very difficult to shield working class families from the rising health costs that helped drive them to the polls. But with Medicaid and subsidy redesign on the table, this part of "replace" could take a constructive path.

Unleashing the States

In addition to redesigning subsidies, another intriguing element is an expanded role for states. The familiar Republican call to take the federal money for Medicaid expansion as a block grant and turn it into subsidies for families to buy private coverage has received plenty of the attention. But the broader theme of giving states much greater flexibility could become a different pathway to the goal of affordable and adequate health coverage for all.

On day one and without any new legislation, a Trump White House could promise states maximum latitude in using Medicaid waivers to redesign coverage. Also on day one, Trump could give states a bright green light to use Section 1332 of the

ACA. This provision permits states to apply for waivers to jettison core elements of the ACA, including the individual and employer mandates, exchanges, and components of the required benefit package, as long as financial protections for families stay in place. The Obama administration did little to encourage states to apply for 1332 waivers, and interpreted the law narrowly. Trump could do the opposite, allowing states to propose their own replacement for major parts of the ACA.

But making full administrative use of Section 1332 would be only the first step. States could move forward in 2017 with insurance rules to replace parts of ACA regulation. Meanwhile, new federal legislation could build on Section 1332 to begin a fundamental shift in the health care relationship between Washington, DC, and the states. Under this vision of federalism, Congress would set the broad coverage objectives and themes of the system, including a regulatory framework of protections and minimum benefits, and would legislate a redesigned set of subsidies, Medicaid funds, and tax benefits for families.

Given the election, this would be leaner than under the ACA. But with that framework in place, and perhaps leaving parts of the ACA in place at least temporarily as a default option, states could propose their own repeal-and-replace plans for federal approval, which could include alternative insurance regulation to accomplish federal goals. In a proposal written 12 years ago, when the ACA was not yet a gleam in elected officials' eyes, and the prospects for any health legislation were particularly bleak, my now-colleague Henry Aaron and I offered a somewhat similar proposal for radical state-led coverage expansion within a national framework—even though our favored state proposals differed sharply. A similar bottom-up, state-led replace approach could be the best option for the new White House today, as well as for friends of the ACA.

To be sure, there are many complex political and technical issues to address in changing course, as there were with the creation of the ACA. Moreover, some campaign promises can potentially undermine others. Allowing citizens in a state to buy insurance in any other state, for instance, would make it much more difficult for a state to design a stable insurance risk pool for its ACA replacement. But within the boundaries of campaign pledges, previous Republican proposals, insurance rules with bipartisan support, and a creative use of federalism and ACA funding, repeal and replace could take a very interesting and constructive course.