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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Reasons To Keep Watch In Health Care Industry

Law360, New York (November 09, 2012, 2:35 PM ET) -- As the health reform law approaches another anniversary, its friends can feel satisfaction in its having cleared the second major hurdle on the path toward expanding access. Some elements of the law, such as those fostering Medicare value-based purchasing, have been less controversial and not seriously threatened either by the Supreme Court review or this week's election.

However, the expansion of health insurance coverage through liberalized eligibility for Medicaid coverage, new subsidies for individuals' purchase of insurance through so-called exchanges and individual and employer mandates have now been directly tested in the court of public opinion, as well as the Supreme Court.

The access provisions clearing those hurdles have many impacts — the need for insurers to consider new markets, for providers to address these programs in managed care contracts and for employers to think about potential options the exchanges might open up for them down the line.

As the access initiative of the Patient Protection and Affordable Care Act rounds the next bend, a couple of other hurdles now come into view: legislation to bridge the fiscal cliff during the congressional lame duck session and an eventual budget and tax deal later in 2013. It is unlikely that this next set of hurdles will completely trip up health reform's access provisions. But a budget deal could still affect the timing and character of these key health reform components.

For instance, the timing of exchange-mediated coverages. At first blush, one might argue that the imperative to deliver on the election promise compels the administration to push exchange-mediated coverages over the finish line for 2014. This theory also finds support in the old Washington adage that it's very tough to take away a benefit once a group of voters have gotten used to it.

A delay for some period, however, could have appeal in the context of the budget deal that eventually needs to be negotiated. It would appeal to Republicans as a potential win but also to some Democrats who would like to extend the cost out for years.

It might also allow more states to develop state-based exchanges rather than rely on the federal fall-back vehicle — particularly with substantial debate as to whether enrollment by way of a federal fallback rather than through the state-operated exchange can receive affordability subsidy.

The fiscal cliff and ensuing deficit reduction or revenue enhancement effort could impact another aspect of access expansion as outlined in the ACA. While increasing the eligibility cap to 133 percent of the federal poverty level is likely to be defended to the last Democratic senator standing, the same need not be the case for the methodology through which the Centers for Medicare and Medicaid Services underwrites the expansion.

Note that House Speaker John Boehner, R-Ohio, the day after the election, called for entitlement reform in trade for revenue concessions. It would be politically more palatable to accommodate that demand through Medicaid funding reform rather than putting off Medicare eligibility or increasing Medicare cost sharing.

Does Democratic orthodoxy prevent this? On the strength of the election results, the line in the sand might be drawn before Medicaid block grants. In the context of an overall deal where some revenue is obtained, however, per-enrollee caps and additional flexibility around state plans might be deemed acceptable.

Remember, there is a Democratic constituency for this type of entitlement reform as well — Democratic governors. They would appreciate the ability to produce Medicaid savings for state budgets and would likely sing the same tune as some House Republicans, as far as states being in the best position to determine cost-effective approaches to meeting beneficiary needs.

With that type of potential alignment, it seems premature to predict that the coverage expansion provisions of the ACA will vault the next fiscal cliff or budget deal obstacles without at least some risk of clipping the bar.

The Supreme Court's ruling in June created another condition that could yet cause a bit of adjustment to the Medicaid expansion leg of health reform. When the court allowed states to reject Medicaid expansion, it created another potential driver for some change in Medicaid state plan dynamics. Perhaps there will be attempts to get states such as Florida and Texas on board with the expansion.

To do so, there might need to be some give and take. Horse trading could occur in the context of budget negotiations likely to stretch well into 2013. The potential mandatory enrollment of "dual eligible" into special integrated Medicare and Medicaid programs is also likely to be on the table — particularly to the extent it has been scored as producing savings.

Thus, while it is true that the coverage expansions in the health reform bill have survived a crucial electoral test, it would be wrong to presume that additional adjustments as to timing and format will not be back on the table when everything is examined for savings possibilities as Congress struggles to find "pay fors" for alternative minimum tax relief, sequestration relief and SGR relief, among others.

For these and many other reasons, health care industry actors would be wise not to take their eyes off the legislative ball in the months ahead.

--By Mark Lutes, Epstein Becker & Green PC

Mark Lutes is a member of the firm in Epstein Becker's Washington, D.C., office.