On Inauguration Day, January 20, 2017, President Trump signed an Executive Order concerning the Affordable Care Act (ACA), and the White House issued an immediate regulatory freeze. Both actions will affect a wide range of laws, regulations, and functions within the federal government. Issuing Executive Orders and directives to stop the issuance of new regulations are normal practice for transitions between administrations.

It is important to understand, however, that neither document in and of itself changes the current state of the law as it relates to the employer shared-responsibility provisions of the ACA and employer reporting.

**Executive Order**

The Executive Order is entitled “Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal.”

Section One of the order states that it is the policy of the new administration to seek the prompt repeal of the ACA, and that “in the meantime, it is imperative for the executive branch to ensure that the law is being efficiently implemented, take all actions consistent with law to minimize the unwarranted economic and regulatory burdens of the Act, and prepare to afford the States more flexibility and control to create a more free and open healthcare market.”

Section Two provides that, to the maximum extent permitted by law, the Secretary of Health and Human Services and all other executive departments and agencies “with authorities and responsibilities under the Act shall exercise all authority and discretion available to them to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the Act that would impose a fiscal burden on any State or a cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products, or medications.”

Sections Three and Four direct federal agencies to “provide greater flexibility to States and cooperate with them in implementing healthcare programs;” and to “encourage the development of a free and open market in interstate commerce for the offering of healthcare services and health insurance.”

The order commits to compliance with the Administrative Procedure Act, which generally requires public notice and comment periods for the issuance of regulations and regulatory revisions, and directs that the order “shall be implemented consistent with applicable law.”

**Long-term Potential Impact of the Order on Employers Is Unclear**

It is important to recognize that the Executive Order does not in and of itself change the legal status of the ACA. Only Congress can repeal the law. The Executive Order may, however, increase the likelihood that the Department of the Treasury and the Internal Revenue Service (“IRS”), along with other regulatory agencies, may choose to exercise their regulatory authority not to enforce certain aspects of the law, including, for example, the individual mandate to obtain health insurance (the “Individual Mandate”).

Because the order does not specify actions to be taken, it is not yet clear how the order will be implemented by
federal agencies. In particular, the timing of the order may pose significant challenges for the IRS, with the 2016 income tax filing season opening on Monday, January 23. The ACA’s “Individual Mandate” is enforced through the federal income tax system, and current laws and regulations (as well as income tax forms and systems) assess a penalty amount for those without health insurance, unless an exemption is available.

Similarly, Applicable Large Employers (ALEs) that are subject to the ACA Employer Mandate are required to furnish to their full-time employees a Form 1095-C, Employer-Provided Health Insurance Offer and Coverage, by March 2, 2017, and to file them with the IRS by February 28 (March 31, if filed electronically). Practically speaking, it is not clear that affected employers would benefit from a delay or waiver of the requirement to furnish and file such forms. Many have already done so, or are prepared to do so over the coming days and weeks. Further, if these forms are not filed, the IRS may not be able to verify that individuals who received premium tax credits for the purchase of health coverage on the Exchanges were actually eligible for them.

In December, the IRS issued non-filer notices to certain large employers that had not filed Forms 1094-C/1095-C for the prior year (2015), which were due on June 30, 2016. If the IRS adheres to the directive that the order “shall be implemented consistent with applicable law,” the IRS may be compelled to proceed with enforcement actions. It may also be noteworthy that the directive to “waive, defer or delay … any provision that would impose … a cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products, or medications” did not specify employers.

However, it is not known how the IRS will respond to the order. Employers will need to wait for any IRS or Treasury Department announcements as to any administrative delays or enforcement changes. In the meantime, employers should consult with their legal counsel to determine a course of action.

Regulatory Freeze

Also on January 20, 2017, Reince Priebus, Assistant to the President and Chief of Staff, issued a memorandum to all Executive Branch departments and agencies entitled, “Regulatory Freeze Pending Review.” This directive provides that subject to exceptions for emergency situations relating to health, safety, financial, or national security matters, federal agencies are to produce no new regulations until the new department or agency head appointed or designated by President Trump approves the regulation. It is routine for new administrations to issue a regulatory freeze on all new and pending regulations in order to ensure that the new president’s appointees have the opportunity to review the rules.

Pending regulations that have not been published in the Federal Register will be withdrawn for review and approval, while regulations that have been published but have not yet taken effect will be postponed for 60 days. Agencies are further directed to consult with the Office of Management and Budget (OMB) concerning regulations that raise substantial questions of law or policy.

Again, this “regulatory freeze” is standard operating procedure for new administrations. Each new administration has issued a similar directive during the last several transitions. Consequently, the IRS and Departments of Treasury, Labor, and Health and Human Services are not likely to issue any additional regulations that may have been in process. In addition, the agencies may need to take additional steps to comply with the Executive Order.
What Should Employers Do Now?

While federal agencies, including the Department of the Treasury and the IRS, may decide in the future to issue non-enforcement policies pursuant to the Executive Order, at this point in time all rules and regulations relating to the individual and employer mandates, as well as to information reporting by employers and insurers, remain in place. Until further notice, employers should continue to consult with their legal counsel on how to comply with all current ACA rules and regulations, including 2016 Forms 1094-C/1095-C furnishing and filing requirements.

For example, at this time, the following requirements continue to apply:

- The obligation to furnish accurate Forms 1095-C to full-time employees.
- The obligation to file complete and accurate Forms 1094-C and 1095-C with the IRS.
- The obligation to continue to track measurement periods, stability periods, offers of coverage, and cost of coverage.

The IRS retains its ability to penalize employers that do not accurately and timely file all ACA forms.

ADP will continue to closely monitor the situation and any directives from the IRS and other agencies. In the meantime, register for our upcoming webinar New Year, New Changes to HR and Tax Compliance on January 31, 2017.

ADP Compliance Resources

ADP maintains a staff of dedicated professionals who carefully monitor federal and state legislative and regulatory measures affecting employment-related human resource, payroll, tax and benefits administration, and help ensure that ADP systems are updated as relevant laws evolve. For the latest on how federal and state tax law changes may impact your business, visit the ADP Eye on Washington Web page located at www.adp.com/regulatorynews.

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