

TACTICAL *responses* TO THE ACA

Sole practitioners and small groups can take aim at health care costs with some insurance options currently available in Virginia.





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The Affordable Care Act (ACA) is at its 10-year milestone; it was signed into law on March 23, 2010. Its intent was to improve access to health insurance and health care while enhancing affordability. The focus of many of its reforms was individual market access; however, its impact has been far-reaching to all market segments of health insurance delivery. Though frequently called health care reform, the net effect of the law's passage was to change health insurance, with little or no positive impact to reducing overall health care costs. Most notably, the reform of individual and small group underwriting created many unintended consequences, and subsequent winners and losers.

CURRENT POLITICAL CLIMATE OF THE ACA

Since its passage and enactment, the ACA has been a center point of political debate. Each constituency argues it either went too far or not far enough. All in all, after many attempts to change the key and most impactful elements of the ACA, it still remains fundamentally intact.

The most notable recent change was the removal of the individual mandate tax. The individual mandate required all Americans to have health insurance coverage or pay a tax, and it was removed as part of the Tax Cuts and Jobs Act of 2017. The removal of this tax has thrown the entire ACA into the courts to question its constitutionality. The basis for the argument of unconstitutionality is that without the tax, the ACA violates the Constitution's Commerce Clause. At present, portions of the law have been deemed unconstitutional by a Texas District Court. On appeal, the 5th Circuit Court concurred and has returned the case to the lower court to determine which, if any, portions of the ACA could stand without the individual mandate tax. The net effect is the case will likely come before the Supreme Court again in the future. There was a request of the Supreme Court for an expedited review from the House of Representatives and a collection of Democratic Attorneys General that would have sped up the Court's review. That request was denied by the Court.

On the legislative side, the often-delayed Cadillac Tax, which would have charged an excise tax of 40 percent on higher-cost plans, has been repealed along with the Health Insurers Tax (HIT), which added roughly 3 percent to the cost of fully insured plans. The HIT

has been on and off again in recent years and will be removed permanently in 2021. In addition, the relatively small Medical Device Tax was also repealed. Lastly, the most recent legislation also revived the Patient Centered Outcomes Research Institute (PCORI) fees, which were set to expire in 2019.

IT IS WHAT IT IS. NOW WHAT?

It is difficult to not be distracted by all the factors that impact the health insurance markets in the post-ACA era. There is a continual barrage of legislation, court cases and bold new proposals of variations of government options, including a single-payer system. However, the continual "what next" leaves many paralyzed into inaction and/or generally confused a great deal of the time. It is my advice to deal with everything where it stands *at the moment* and do not attempt to predict the constant "what next."

Some changes in recent years do bring some relief to certain individuals and smaller groups, which are the market segments most affected by the ACA's provisions. Here are some courses of action for those constituents.

SOLE PROPRIETORSHIPS AND VERY SMALL GROUPS

In 2018, Virginia SB 672 expanded the definition of a small group in Virginia to include sole proprietors. The intent of the law was to provide sole proprietors, many whom could not receive an ACA subsidy, an option to the ACA's individual market. I believe most would agree that absent a subsidy, these plans had higher rates and less attractive benefits than comparable small group plans. In addition, individual plans typically have smaller networks and more restrictive managed care principles, smaller prescription formularies, referral requirements, etc., than most small group plans. To be eligible to purchase a small group plan as a sole proprietor, certain criteria must be met:

1. They must be the sole, 100 percent owner
2. They can have no other employees, including permanent part-timers
3. They must have the appropriate tax documents from the preceding tax year. Carriers typically request a Schedule C. ►

Organizations will **continue to look to their CPAs** to help navigate an increasingly complex and ever-changing health care environment. **CPAs can assist** by assembling a solid advisory team to help their organizations or those of their clients.

If all the aforementioned criteria are met, then the entity can implement a small group policy with just the owner and their family covered.

LLCs

SB 672 did much to help certain sole practitioners. However, it still left ineligible for coverage many LLCs that had multiple partners, yet no employees. The definition of an employee was again expanded in 2019 for small employers in the Virginia Code. The law now recognizes LLC owners as employees for the purpose of health insurance. Now an LLC with two or more owners, related or otherwise, and no other employees may purchase a small group plan.

These changes have greatly enhanced the health insurance options and solutions for many small businesses in Virginia. One thing to keep in mind, whether searching for options for your organization, or advising clients, is to seek expert help. I receive many calls where a business owner incorrectly assumes that they cannot obtain a plan if it is only needed for just one employee or the owner themselves. Many times, small group options are available, but the business owner has been advised incorrectly that these options were nonexistent. Group plans can be implemented in most instances — as long as the employees who will waive the plan are covered on other health insurance. We have many clients with just one employee enrolled out of several.

SMALL GROUP SELF-INSURANCE

The ACA negatively impacted rates for small groups with fewer than 50 employees and demographics more favorable than the normative average of the pool; that is, younger in age and/or lower in risk factors. To alleviate the negative impact of the ACA's underwriting changes, of smaller variance in age spread of 3-to-1 for the rates of the youngest to oldest and no medical

underwriting, many carriers began to self-insure smaller clients. This approach allows an insurer to base their rates on an organization's demographics and medical risk factors. Employers with favorable demographics can take advantage of rates lower than fully insured ACA rates. I had several clients this year who have reduced their health insurance rates by 25 percent or more while maintaining benefit comparability utilizing this strategy.

Small group self-insurance is typically available for groups with 10–50 employees. However, there are exceptions above and below these parameters for a few carriers. Procedurally, it is fairly easy to obtain final rates for employers with more than 25 employees. Most carriers will provide firm rates with a member-level census, which lists all employees and their dependents by zip code, and a risk form from the group noting known medical conditions. Of course, due to HIPAA Privacy Regulations most employers should know very little. Generally, organizations with fewer than 25 eligible employees will be required to complete individual medical questionnaires, which allow the carrier to assess the medical risk of a group. This process is more disruptive than the simplified underwriting available to larger groups.

If you choose to evaluate this option and individual medical applications are required, I would suggest utilizing an online tool to capture the information or having the employees place their paper applications in a sealed envelope to be delivered to the employee benefit advisor directly. I believe it is unwise to have medical information on your employees in your organization, or have others know the medical conditions which may exist in a small organization. It can generate many privacy issues surrounding someone knowing anything about the medical conditions of an employee and/or their family members. I would also suggest a universal medical form be used, if possible, so rates can be gathered

from as many carriers as feasible. If your organization has less than 25 employees, you may still be able to obtain a quote from your existing carrier with no medical risk forms submitted. This is possible since the existing carrier has all information on the insured population in their claim system. Many times, carriers will proactively release a self-insured option when they determine a group is a good candidate. Our organization reminds the carrier to evaluate this at each renewal.

Small group self-insurance has all the same components as large group self-insurance; medical claims, administrative fees, specific stop-loss reinsurance for claims on an individual and aggregate reinsurance for protection of the entire group. Most carriers have simplified this a bit for small employers and essentially charge an employer a maximum rate. This rate includes all components: claims, administrative fees, reinsurances, claim run out, etc. The employer's liability with small group self-insurance is limited to the maximum rates the carrier charges. If the claims are worse than a carrier projects, they do not recoup anything beyond the maximum rates charged. However, if the claims level is lower than the carrier projects, there may be some refund of payments to the employer. The level of refund can vary by carrier, and even within options of a carrier. My experience is most return 50 percent of the savings to a group that has lower claims than their projections. Given the variability in claims for small clients, I advise them not to have any expectation of a refund. In my opinion, this approach should be viewed as a way to procure rates that are better than those available under the ACA.

If you do evaluate small group self-insurance, there are things of which you should be aware and questions you should ask to be sure you understand the arrangement. Key questions include:

1. **Is my liability capped?** You want to ensure that the liability is indeed capped, and this is usually not an issue under standard arrangements with the major carriers like Aetna, Anthem, Cigna, Optima, UnitedHealthcare, etc. However, there are options available from many third-party administrators in the market as well. These can be fine alternatives, but you need to be sure your liability is capped and there is no unexpected claim run out liability.
2. **Who does the reporting?** As a self-insured employer, you are responsible for U.S. Internal Revenue Service (IRS) Section 6055 ACA reporting. For small group self-insured plans, this is a 1094-B transmittal to the IRS and a 1095-B to the employees. In addition to 6055 reporting, self-funded employers must remit their own PCORI fees. You should be aware who is responsible for this reporting

under any self-insured arrangement since carriers can vary in their approach to this component.

3. **What happens if I cancel the plan off of my renewal cycle?** You should make certain this is allowable. It has been my experience that this is usually an option, but you want to make sure — particularly if you are considering a business sale.

DO WHAT YOU CAN TODAY

The ACA has had a major impact on health insurance delivery since its inception 10 years ago. Its impact on individuals and organizations has varied based upon one's own situation. As the implementation of the law continues to progress, I anticipate more changes and challenges. My advice has remained constant since the inception of the ACA:

1. **Move forward with what you know to be the case today.** Predicting the future is not possible.
2. **Fully analyze your situation** to maximize your positioning relative to the ACA and the insurance markets.
3. **Do not go it alone.** Get good advisory help from someone who understands the options.

Remaining informed on developments is key and staying on top of the various available solutions is imperative. Organizations will continue to look to their CPAs to help navigate this increasingly complex and ever-changing environment. CPAs can assist by assembling a solid advisory team to help their organizations or those of their clients. By being an integral part of the process the value you deliver to your clients or organizations can be greatly enhanced. ■

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