

Governor Cuomo and New York Department of Financial Services Respond to Congressional Efforts to Repeal the Affordable Care Act with “Aggressive Actions”

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On 5 June, 2017, in response to the congressional efforts to “repeal and replace” the Affordable Care Act (the ACA)¹, the New York Department of Financial Services (NYDFS) issued a press release entitled “Governor Cuomo Announces Aggressive Actions to Protect Access to Quality, Affordable Health Care for All New Yorkers” (the Press Release), which outlines the “aggressive actions” Governor Andrew M. Cuomo intends to take to “make certain that no matter what happens in Congress, the people of New York will not have to worry about losing access to the quality medical care they need and deserve.”²

The Press Release outlines three types of actions that will affect how health insurers operate in New York even if Congress passes a bill to repeal significant requirements of the ACA: (1) NYDFS will promulgate new emergency regulations applicable to health insurance companies; (2) the Department of Health and other state agencies will take certain actions against health insurers that withdraw from offering Qualified Health Plans on the State Health Marketplace; and (3) existing regulations regarding coverage for contraceptives will be enforced. The Press Release provides that the “new first-in-the-nation measures will ensure that essential health services are protected and covered for all New Yorkers regardless of efforts at the federal level to strip millions of Americans of their healthcare.”

New Emergency Regulations

According to the Press Release, NYDFS will promulgate new emergency regulations that incorporate certain ACA protections into New York state law. The new regulations will apply to individual and small group accident and health insurance policies that provide hospital, surgical, or medical expense coverage and student accident and health insurance policies. Such policies will be required to cover the same categories of essential health benefits (EHB) and be subject to the same EHB benchmark plan rules as are currently required under the ACA.

¹ On 4 May 2017, the U.S. House of Representatives passed the American Health Care Act of 2017 by a vote of 217-213, which would substantially affect the U.S. health insurance market as it currently operates under the Affordable Care Act. No vote has yet taken place in the Senate.

² See N.Y.D.F.S. Press Release, “Governor Cuomo Announces Aggressive Actions to Protect Access to Quality, Affordable Health Care for All New Yorkers,” 5 June 2017, <http://www.dfs.ny.gov/about/press/pr1706051.htm>.

The Press Release also states that NYDFS may issue model contract language regarding the coverage requirements for individual and small group accident and health insurance policies that provide hospital, surgical, or medical expense coverage and student accident and health insurance policies delivered or issued for delivery in New York State. NYDFS currently provides model language on various topics for comprehensive individual and small group hospital, surgical, medical health insurance products for purposes of product filings.

The new regulations will be promulgated as emergency regulations. The New York Administrative Procedure Act allows emergency regulations to be adopted when an agency determines that immediate adoption of a rule is “necessary for the preservation of the public health, safety or general welfare” and that compliance with the general rulemaking requirements would be “contrary to the public interest.”³ An emergency regulation generally remains in effect for only 90 days but may be readopted on an emergency basis for 60-day periods.

State Actions against Withdrawing Insurers

In the midst of health insurers announcing future withdrawals from ACA health insurance exchanges in various states, Governor Cuomo has directed states agencies to take certain actions against insurers who withdraw from offering Qualified Health Plans on the State Health Marketplace. The Department of Health will ban withdrawing insurers from participating in “any program that interacts with the marketplace, including Medicaid, Child Health Plus, and the Essential Plan.” The Press Release states that “New York is home to one of the most robust health insurance marketplaces in the country, and insurers who do not comply will lose access to such profitable programs.”

Other state agencies and authorities will be directed not to contract with insurers that withdraw from the State Health Marketplace. Further, state agencies will be directed to “consider all available actions to protect New Yorker’s access to quality healthcare.”

Existing Contraceptives Regulations

The Press Release provides that NYDFS will enforce requirements applicable to health insurers under existing State law relating to contraceptives and medically necessary abortion services. New York law requires health insurers that provide prescription drug coverage to provide coverage for all contraceptive drugs and devices.⁴ New York law currently includes the ACA requirement that health insurance cover at least one form of contraception in each of the FDA-approved contraceptive categories without co-pays, coinsurance, or deductibles, and the Press Release states that this requirement will continue to apply in New York even if the ACA is repealed.⁵ Existing New York law also requires health insurers to meet certain contraceptive dispensing requirements and disclosure requirements regarding coverage information.

In addition to coverage for contraceptives, except in the case of a high deductible plan, insurers also must provide coverage without cost-sharing for abortion services that are medically necessary.

³ See N.Y. A.P.A. Law § 202(6).

⁴ See Supplement No. 1 to N.Y. Ins. Cir. Letter No. 1 (2003), 21 January 2017.

⁵ N.Y. Ins. Law §§ 3221(l)(16); 4303(cc).

Looking Forward

We await the promulgation of new emergency regulations that incorporate the referenced ACA requirements into New York law. In this period of congressional uncertainty, it remains to be seen whether other states will follow Governor Cuomo's lead.

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