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INTRODUCTION

With Democrats Jon Ossoff and Raphael Warnock winning their Senate runoff races in Georgia on January 5, President Joe Biden will have a razor-thin Democratic majority in both the House of Representatives and the Senate. The Democratic victories in the two Senate races give fresh momentum to broad health and paid leave policies supported by Biden that were unlikely to advance had the Senate remained under Republican control. However, even with the Senate under Democratic control, there remain challenges to the enactment of sweeping policy changes.

The House Democratic majority is reduced in size, leaving a narrower path for partisan legislation to pass. The Senate is now split 50-50 with Vice President Kamala Harris able to cast a tie-breaking vote, handing control of the upper chamber to Democrats for the first time since 2014. Although the rules governing the organization of the 50-50 Senate split have not yet been finalized, incoming Senate Majority Leader Charles Schumer (D-NY) will be able to set the legislative agenda and Democrats will hold the gavels on the committees. Importantly, Senate Democrats will also set the agenda for consideration of nominations and have the means to confirm nominations rather quickly on a party-line vote, facilitating timely approval of key positions within the agencies. Although many high-level nominees have been announced, with Democrats in control of the confirmation process, remaining nominees may prove to be more progressive or controversial than would have been considered under Republican control.

The influence of a unified Democratic government suggests that significant legislative changes will be proposed and pursued with great urgency in the next session of Congress, including initiatives with significant implications for employee benefits policy. The first order of business for the Biden administration and new Congress is expected to be additional COVID-19 relief and economic stimulus legislation. Beyond addressing the pandemic, Congress could turn to more far-reaching health reform initiatives. Biden will be able to obtain support for more of his agenda than would be the case if either Democrat had lost his race in Georgia. However, he will likely face strong headwinds in any attempt to pass strictly partisan legislation.

Although the Democrats have the majority in the Senate with Harris’ tie-breaking vote, they failed to achieve a 60-vote “supermajority,” which means the Republicans will be able to filibuster and block the advance of legislation. This means that the incoming Democratic majority will need to (1) entreat moderate Republican senators to cross the aisle and vote with Democrats, (2) use the “budget reconciliation” process, which only requires a simple majority but requires that the underlying legislation have a measurable revenue effect (as was done for the Tax Cuts and Jobs Act and key parts of
the Affordable Care Act (ACA)), or (3) change the Senate rules to eliminate the longstanding filibuster rule.

Even if Democrats operate under rules that require a simple majority to pass legislation, finding consensus within the Senate Democratic caucus and its progressive and more moderate wings may prove challenging. Democratic Senators hailing from traditionally “red” or “purple” states will likely serve as critical votes and be more reluctant to pursue more progressive policies. Furthermore, turning to the budget reconciliation process to pass health policy changes presents a challenge due to the so-called “Byrd Rule” that prevents a reconciliation bill from containing non-budgetary provisions or increasing deficits beyond the budget time frame. The Senate can waive any objections raised with respect to the “Byrd Rule,” but this would require 60 votes, meaning bipartisan support would be necessary.

The following is a detailed summary of the probable impact of the election on health and paid leave benefits policy. (For the corresponding summary relating to retirement policy, click here.)

**EXECUTIVE SUMMARY**

The impact of the election on employer-sponsored health coverage could be profound. Although Biden’s health plan still envisions a role for employer-sponsored coverage, the new administration, with the support of a Democratic Congress, could signal significant changes ahead. The Council has analyzed the divergent approaches of the outgoing and incoming administrations to provide members with an outlook of what may come.

**Health Care Coverage**

The topline message of Biden’s health care plan is that his administration will “protect and build on” the ACA as the law faces an uncertain fate in the Supreme Court. Proposals include expanding the number of individuals eligible for Marketplace subsidies (including those with employer coverage), increasing the generosity of those subsidies, and creating a public health insurance option like Medicare that would be available to all individuals through the ACA Marketplace. Biden has also called for lowering the Medicare eligibility age from 65 to 60. Proposals for Medicare buy-in may also remain in play.

**Health Care Costs**
Biden’s plan to lower health care costs centers on the government negotiating rates with providers within the public option, as well as aggressively using anti-trust authority to address health care market consolidation.

**Prescription Drugs**

With the Democratic sweep, the pricing provisions and other elements of drug pricing legislation that passed the House of Representatives a year ago (H.R. 3) are more likely to be enacted in some form, and serve as a starting point for negotiations. Savings generated from these reforms would be applied to reduce prescription drug costs for Medicare recipients and help fund other health care initiatives.

**COVID-19**

Additional COVID-19 relief and stimulus legislation beyond what was enacted in the Consolidation Appropriations Act, 2021 (CAA) is expected to be among the first orders of business in the new Congress. Provisions from the House-passed Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act that were not included in the CAA, including proposals ensuring health care coverage during the pandemic, are likely to be included. Biden’s “American Rescue Plan” – a $1.9 trillion pandemic relief package – does include COBRA subsidies. However, it remains to be seen whether COBRA subsidies and other COVID-related legislative and regulatory relief that has been provided to employers, plans and employees – including those related to expanded telehealth access – will be approved by Congress or extended under the Biden administration. A more robust and coordinated approach to COVID-19 testing and vaccines will be priority. The new administration is also expected to focus on the health disparities so clearly brought into focus by the pandemic.

**Paid Leave**

Paid sick leave and paid family and medical leave legislation is expected to be a priority in the new Congress and administration. The Council’s statement of principles provide a framework for our ongoing advocacy for federal legislation that would preempt state and local laws and enable uniform nationwide standards that leverage private sector solutions.

**Regulatory Action**

The Biden administration is likely to revise or undo a number of rules promulgated by the current administration, such as those on health care nondiscrimination, association health plans and short-term insurance. With Democratic control of the
White House, House and Senate, Democrats may turn to the Congressional Review Act (“CRA”) to nullify controversial health policy regulations issued at the end of the outcoming administration’s term. However, Congress would have to act quickly to overturn any such regulations through the CRA, which provides an expedited process for Senate consideration avoiding a filibuster. Other regulations, such as the recently released transparency rules, may well stay in place. In addition, implementation of the group health plan provisions of the CAA, including those related to surprise billing, will play a prominent role in the agenda of the Departments of Health and Human Services, Labor and Treasury.

**OVERVIEW**

Biden presented voters with a dramatically different vision of health care from that of the current administration. With Biden’s election, and Democratic control of the House and Senate, substantial changes in health care benefits policy are likely on the horizon. This paper examines the impact of the Democratic control of the White House and Congress on health policy and what this means for businesses and the future of employer-sponsored health coverage.

The COVID-19 pandemic and ensuing economic crisis have brought the employer-sponsored system under intense scrutiny, with questions about the linkage of health coverage to employment in the face of almost unprecedented job losses. Unlike many of his challengers for the Democratic nomination advocating for Medicare-for-All, Biden’s health policy platform still envisions a role for private insurance. However, the incoming president’s endorsement of a new government-run “public option” that would be available on the ACA Marketplaces, along with expansion of the ACA premium subsidies, may nonetheless have a significant impact on employer-sponsored health coverage.

Beyond policies to expand access to health care coverage, the incoming administration and Congress intend to take an aggressive approach to reducing health care and prescription drug costs. These cost-saving measures would be used, at least in part, to help offset the price tag of coverage expansion. Yet, questions about the application and impact of these policies on the commercial market remain and will be of critical importance for employer plan sponsors.

Differing approaches to responding to the COVID-19 pandemic were top of mind for many voters and seen to fuel Biden’s victory. With the pandemic still raging on inauguration day, a broad COVID-19 relief and economic stimulus bill beyond what was enacted in the CAA is expected to be the first order of business of the new
Congress. Ongoing efforts to combat the virus and its economic fallout will likely continue to dominate the agenda. Beyond COVID-19 relief, whether significant health policy changes come through legislation and/or regulation will depend on the extent to which legislation can advance in the Senate through the reconciliation process or otherwise. With a slim margin in the House and a 50/50 split in the Senate, the legislative pathway is narrow and one in which centrists will play a prominent role.

Meanwhile, the Supreme Court heard arguments on the latest challenge to strike down the ACA in November, a challenge supported by the outgoing administration. If the court does strike down the ACA, Biden and the new Congress will seek to act quickly to prevent those with ACA coverage from becoming uninsured and perhaps go even further. Or Biden and the new Congress may seek to pass legislation to protect and build on the ACA, even before the Supreme Court has a chance to rule.

Below, we discuss key health policy issues that could arise in the new Biden administration and the 117th Congress.

**Health Care Coverage**

**Build on the ACA**

The topline message of Biden’s health care plan is that his administration will “protect and build on” the ACA, “instead of starting from scratch and getting rid of private insurance.” As such, the focus will be actions intended to increase access to affordable coverage by expanding the ACA, with an emphasis on increasing the number of individuals eligible for the ACA Marketplace subsidies and increasing the generosity of those subsidies. Policy elements include removing the current prohibition on subsidies for those with household incomes over 400% of the federal poverty level. Instead subsidies would be provided so that, for all individuals, Marketplace coverage would cost no more than 8.5% of household income, and in many cases much less. Also, the amount of the subsidies would be based on a “gold” plan (an 80% actuarial value), rather than the current less-generous “silver” benchmark plan (a 70% actuarial value).

**Remove the Marketplace Subsidy “Firewall” For Employees**

Of direct significance to employers, the Biden plan also calls for removing the current prohibition on Marketplace subsidies for employees with offers of employer-sponsored coverage (including affordable, high-quality coverage). The potential removal of this prohibition, which would allow employees to choose to go to the Marketplace with a subsidy, if otherwise eligible, would also have a direct effect on the
employer mandate unless the basis upon which the penalty is imposed is changed. Currently, the employer mandate penalty is based on the number of full-time employees who receive Marketplace subsidies.

Although Biden’s health care plan does not explain if and how the employer mandate would change, it seems likely it would. There are a range of possibilities, including, perhaps most likely, increasing the employers’ requirement toward affordability or changing the trigger for the penalty so that it is simply based on what is offered without regard to whether employees choose coverage in the Marketplace. Eliminating the penalty altogether seems unlikely given the significant impact on the federal budget. It also stands to reason that if there are changes to the employer mandate, changes to the related ACA reporting will follow.

Given how expensive it would be from a federal budgeting perspective to eliminate the employer mandate firewall (likely hundreds of billions of dollars), Congress could instead decide to lower the amount employees are required to contribute for employer coverage to be deemed “affordable”. Currently, workers can be required to contribute as much as 9.78% of their income – this number could be lowered, for example, to 8.5% of income and this limit could become applicable to family plans (rather than employee-only plans). This could be a ‘less expensive’ way to make coverage more affordable for lower-wage workers and to potentially expand the employee population eligible for Marketplace subsidies.

Not all elements of the Biden plan to expand access to coverage are revisions to the ACA. Some would be new, and significant.

Public Option

The Biden plan includes a new federal public plan option that would be offered to any and all individuals through the ACA Marketplace, including employees (and their families) who have access to employer-sponsored coverage. The public option would negotiate prices with providers and would be provided to some, without cost, in states that did not expand Medicaid as allowed under the ACA. It is unclear if the ‘negotiated’ prices will apply to other Marketplace plans or just the public option – and whether employer plan sponsors would have access to the negotiated prices. The Biden plan does not seem to contemplate that at this point. It is unclear if and to what degree the reconciliation process can be used to pass legislation creating a public option.

Lowering the Medicare Eligibility Age

In addition, Biden has called for lowering the Medicare eligibility age from 65 to 60, but allowing those who prefer to remain on their employer plans to do so and
prohibiting employers from excluding older workers from coverage. Other Democratic Medicare buy-in proposals likely remain on the table as well.

This array of potential health coverage policy changes raises significant issues for employers, which are complicated, uncertain and will depend on which subset of policies are adopted and the ultimate parameters of those policies. Potential concerns include:

- Increased taxes on employers to pay for expanded coverage.
- Cost-shifting from public to private plans (assuming the rates negotiated for the public option are not extended to the private market).
- Weakening of the employer plan risk pool (if lower risk employees choose the Marketplace but higher risk employees retain employer-sponsored coverage, including due to narrower networks and higher out-of-pocket costs in many Marketplace plans).
- Degradation of the employer-sponsored system.
- Reduced quality/value of care for employees and their families.
- Potential advantages include:
  - Increased health care access and choices for some employees.
  - Improvements to the employer risk pool (if higher risk employees are covered by Medicare or choose the Marketplace because it covers all essential health benefits).
  - Reduced costs in employer-sponsored coverage.
  - Reduced “job lock.”

While, at this point, there is a broad-strokes sense of the priority items, the details need to be developed and will be crucial to assessing the impact for employers and employees.

These changes would generally need to be accomplished legislatively rather than regulatorily. Our expectation is that at least some of these policies would be included in legislation early in the Biden term, in response (or possibly in advance of) the Supreme Court’s upcoming ruling on the ACA. Due to the cost and the political capital required, it is likely that certain elements may not be included in the first major round of health care legislation. More likely, actions to build on the ACA will be a priority. As a natural result of what will likely be an extensive policy making process, other elements may drop off the priority list, including a public option or eliminating the Marketplace subsidy firewall for employees.

Of course, the cost of these changes to the federal government is a major issue that will factor into the calculus of what can be achieved and when. Congressional Budget
Office (CBO) cost estimates will shape both the parameters of the provisions that are ultimately adopted and lead to some items being jettisoned or held for a later effort. According to reports of statements by the Biden campaign, they estimate the health care plan to have a net cost of $750 billion over 10 years, taking into account savings expected from certain aspects of the plan, including prescription drug cost reform, described later in this paper. According to Biden’s campaign materials, the health care plan would be paid for by raising income taxes on high-income individuals and raising the capital gains tax. More detailed information about the costs of the individual elements of any proposed legislation will be essential to enacting these policies.

**HEALTH CARE COSTS**

While not as prominent as the policy priorities regarding expanding access to coverage and building on the ACA, Biden’s health care plan also includes several items intended to lower health care costs.

**Negotiated Rates with Providers**

Some elements of the plan to reduce health care costs reiterate aspects of the plan to increase coverage, including the public option, which is intended to provide lower prices as negotiated by the federal government. Potential concerns include cost-shifting to the employer market if the rates available in the public option are not available in the private market. Of course, a key goal for policymakers and employers, alike, is to reduce health care costs. The Biden plan does not address how his administration would address and incentivize quality and value in health care, as another essential element of reducing health care costs, separate from the ability to negotiate the lowest price possible with providers in the public option.

**Marketplace Subsidy Expansion**

The Biden plan also includes, as part of efforts to address affordability, expanded eligibility for and generosity of the Marketplace subsidies, which would allow individuals and families to purchase higher value plans with lower out-of-pocket costs.

**Antitrust Authority**

The Biden plan for lowered health care costs does not just reiterate the Marketplace expansion and public option ideas but also includes some distinct ideas, including
“aggressively” using existing antitrust authority to address concentration of market power, among hospital and physician practices.

**Surprise Billing**

The CAA included legislation banning out-of-network providers, including air ambulances, from balance billing patients in “surprise” billing situations. However, it does so by leaning heavily on arbitration to resolve billing disputes and veers away significantly from the market-based, local, median in-network rate approach provided in the Council’s preferred solution. The agreement does contain “guardrails” to the dispute resolution process by directing the arbitrator to consider the median in-network rate and prohibiting consideration of the providers’ billed charges. However, the final legislation also explicitly prohibits arbitrators from considering Medicare and Medicaid rates in deciding the appropriate reimbursement amount. The next battle over surprise billing is with the regulatory process. How the Biden administration implements the legislation will be crucial in terms of how the new legislation will affect employers and employees and health care costs.

**Transparency**

There have been recent efforts in Congress and in the executive branch to lower health care costs by increasing transparency (including legislation to prohibit anti-competitive contract terms that limit the ability of plan sponsors to pursue value-based insurance designs). Based on materials provided so far, transparency does not seem to be an emphasis in the Biden health care plan. However, as discussed below, we expect the recently finalized regulatory efforts surrounding price transparency for group health plans, at least largely, to stand.

Although addressing rising health care costs is a crucial issue for employers, it remains to be seen how much of a priority this will be for the Biden administration. It appears that expanding access to coverage under the ACA ranks higher, but the Biden health care plan’s discussion of affordability indicates there will be some focus on this issue as well. What is not emphasized in the Biden plan are policies to improve quality and value of care – as distinct from simply lowering costs – which employers continue to emphasize is a key element to addressing health care costs.

The CAA bans so-called “gag clauses” in contracts between providers and health plans that prevent enrollees, plan sponsors, or referring providers from seeing cost and quality data on providers as well as certain de-identified claims data. It also bans gag clauses that prevent plan sponsors from sharing such information with third parties as part of Health Insurance Portability and Accountability Act (HIPAA) business associate
agreements. The Council strongly supported this provision as part of the previous Congress’ Lower Health Care Costs Act, as approved in 2019 by the Senate Health, Education, Labor and Pensions Committee. However, the CAA omitted other Council priorities contained in the Lower Health Care Costs Act, and it remains unclear whether the incoming administration and Congress will strive to build on these efforts.

### Prescription Drug Costs

**Price Caps**

Lowering the cost of prescription drugs was a focus of efforts by the current Congress and administration prior to the pandemic. Congress did not reach consensus on the different legislative approaches, including the House of Representatives-passed Elijah E. Cummings Lower Drug Costs Now Act (H.R. 3), the Prescription Drug Pricing Reduction Act (S. 2543), approved by the Senate Finance Committee, the Lower Health Care Cost Act (S.1895), approved by the Senate Health, Education, Labor and Pensions Committee, and the Lower Costs, More Cures Act (H.R. 19). Although there were common, bipartisan elements to these drug-pricing proposals, the White House and many congressional Republicans remained opposed to the central feature of H.R. 3 – empowering Medicare to base prescription drug reimbursements on the amounts paid by six other countries.

Under a Biden administration and Democratic control of Congress, this pricing provision and other elements of H.R. 3 seem more likely to be enacted, at least in some form. However, a narrower majority in the House and an evenly divided Senate will nonetheless make passage of sweeping drug pricing legislation more challenging.

Biden’s health care plan and the Biden-Sanders Unity Platform would direct the Medicare program “to target excessively priced prescription drugs that face little or no competition” and create an independent review board to evaluate value, attribute the federal contribution through publicly sponsored research and development and recommend price parameters for prescription drugs. The Secretary of Health and Human Services (HHS) would be empowered to negotiate prices that are capped to a level associated with the average price in other countries.

Under H.R. 3 (and, presumably, the Biden plan), the negotiated rate would apply to Medicare and would also be available to private plans in the group and individual markets. This means the negotiated price for a covered drug would be available to employer plan sponsors at their option. The savings generated from this provision contributes, in no small part, to the momentum for its enactment. The CBO estimated that the price negotiation provision of H.R. 3 would result in a 10-year savings of $448.2 billion for Medicare and $12.3 billion for private health insurance. These savings could
be redirected toward lowering drug costs for seniors and expanding health coverage. It is unclear what position the new administration will take with respect to the “most favored nation” interim final rule issued by the outgoing administration. The interim final rule, which ties prices for certain drugs in Medicare Part B to lower prices abroad and set to go into effect January 1, 2021, was temporarily blocked by the U.S. District Court for the District of Maryland.

Inflation Rebates

The Biden plan calls for imposing inflation limits for certain drugs under Medicare and the public option. Both H.R. 3 and the bill approved by the Senate Finance Committee included similar provisions requiring manufacturers to pay a “rebate” to Medicare if the price of a drug rises faster than inflation. However, this proposed inflation rebate only applies to Medicare. Although details remain sparse, it appears the Biden proposed inflation rebate would be limited to Medicare and the public option. Consequently, the effects of the inflation rebate could negatively affect employer plans if costs rise on non-governmental plans.

Drug Importation and Increasing Competition

Biden supports allowing consumers to buy prescription drugs from other countries if HHS has certified that those drugs are safe. The current administration and outgoing Senate Finance Committee Chairman Charles Grassley (R-IA) also back drug importation, but this is likely to become a reality under the new administration and next Congress. Also under the banner of enhancing competition are proposals to improve the supply of quality generics and prohibit practices that delay the entrance of a generic into the market. A number of these proposals have bipartisan support and are likely to be included in more comprehensive drug-pricing legislation in the near term.

PBM-Related Proposals

Notably absent from Biden’s plan was a proposal recently finalized by the outgoing administration to require that drug manufacturers’ rebates to pharmacy benefit managers (PBMs) be passed along to consumers in privately administered Medicare Part D prescription drug plans. Congressional Democrats had raised objections to this proposal and concerns about its impact on Medicare premiums. It is unclear how the Biden administration will approach this regulation, and whether Congress may seek to nullify the rule through the Congressional Review Act. It is unclear if the new administration and next Congress will take other action directed at PBMs, such as requiring greater transparency or curbing spread pricing - the difference between the payment the PBM receives and the reimbursement amount it pays to the pharmacy.
dispensing to the beneficiary.

The Council’s [February 4, 2020, letter to Congress](#) stated, “as the largest purchaser of prescription drugs in the United States, employers are deeply concerned about prescription drug costs” and “bold action is needed to lower prescription drug costs and increase transparency to ensure that public and private payers and patients spend resources more wisely.” Significant action on prescription drug pricing is likely coming next Congress, and the Council will continue to advocate for policies that bring lower cost and higher value to commercial and public markets alike.

**COVID-19**

The COVID-19 pandemic and the federal government’s response to the twin public health and economic crisis was the defining issue in the election for many voters. Biden presented a starkly different view of the pandemic and the federal response to it than Donald Trump. It surely will be the consuming issue for Biden upon his inauguration as the country is in the throes of the pandemic.

Although policymakers reached agreement on a more targeted COVID-19 relief at the end of the last Congress, Democrats will have the power to enact more sweeping legislation under the new administration and Congress. Passing such a package, perhaps through the budget reconciliation process, is likely to consume the Biden administration’s agenda for first 100 days. Biden unveiled his $1.9 trillion pandemic relief, the “American Rescue Plan.” The plan has already come under criticism from some congressional Republicans, raising the prospects for use of the reconciliation process.

**COVID-19 Testing and Tracing**

Biden’s [COVID plan](#) calls for a more robust and coordinated federal response, vowing to make tests widely available and free. He will also seek a national system for tracing the exposure path for those diagnosed with the virus as part of a larger public health corps.

**COVID-19 Treatment**

Group health plans and insurers are already required to cover COVID-19 testing and vaccines without cost-sharing under the Families First Coronavirus Response Act and the Coronavirus Aid, Relief and Economic Security (CARES) Act. The Health and
Economic Recovery Omnibus Emergency Solutions (HEROES) Act, passed by the House of Representatives in the previous Congress, would require group health plans to cover COVID-19 treatment without cost-sharing. Employers can expect that this provision is likely to be included in COVID relief and stimulus legislation.

Accelerating the Development and Distribution of COVID-19 Vaccines and Treatments

One of the new administration’s most important and challenging tasks is to deliver on the promise to administer 100 million vaccines in 100 days, entailing addressing the shortcomings of the current administration’s Operation Warp Speed’s vaccine distribution efforts. Biden’s plan provides explicit authority for the HHS Secretary to approve the commercial price of vaccines that are developed in conjunction with federally funded research. According to the plan: “This ensures that the private, as well as the public sector, will not be subjected to vaccine prices that fail a ‘fair and reasonable’ cost standard and, even if the vaccine is available free of charge, will protect the taxpayer from being gouged.” The American Rescue Plan would invest $20 billion in a national vaccination program in partnership with states, localities, Tribes and territories. On October 28, the Trump administration issued an interim final rule on the CARES Act requirement for group health plans and health insurers to promptly cover the cost of the COVID-19 vaccine without cost-sharing. However, numerous questions remain about the scope of group health plans and employers’ actions with respect to the distribution and cost of the vaccine for their workforce.

Health Insurance Coverage During the COVID-19 Crisis

According to a Biden campaign fact sheet, for workers who lost their employer-based coverage because they lost their job, the federal government would step in and cover 100% of the cost of keeping them on their employer-based plan with COBRA subsidies. The American Rescue Plan calls on Congress to subsidize COBRA through the end of September. The Council and Alliance to Fight for Health Care have been advocating for Congress to pass COBRA subsidies and similar continuation coverage of at least 90% to help workers who have lost their job or been furloughed to stay on their employer plans. This provision was in the original HEROES Act but removed in the revised HEROES Act and replaced with access to ACA premium subsidies during the pandemic for individuals receiving unemployment compensation regardless of income. For individuals with higher incomes, premium subsidies will be determined as if their income was 133% of the poverty level. Given the shift in control of the White House and Senate, disputes during the current Congress over the application of “Hyde Amendment” abortion funding restrictions to COBRA subsidies would presumably not impede enactment of COBRA subsidies in the next Congress. However, it is not entirely clear what route the new administration and next Congress will take with respect to
health coverage for workers who have lost their job or to assist employers maintaining jobs and health benefits for their employees.

**Telehealth and Other COVID-Related Relief**

Throughout the pandemic various forms of legislative and regulatory relief and guidance have been provided to employers, plans and employees, much of it time-limited to either the public health emergency or some similar time period. This includes relief related to telehealth, including a CARES Act provision allowing health savings account (HSA) eligible high-deductible health plans (HDHPs) to cover telehealth pre-deductible and guidance allowing employers to offer stand-alone telehealth to non-benefits eligible employees. The COVID-19 crisis has dramatically increased the use and availability of telehealth and, due to this fundamental shift, some of the relief and guidance that has been provided temporarily may well become permanent. More generally, there is an array of other crisis-related guidance, including allowing HDHPs to cover COVID-19 treatment pre-deductible and employee assistance programs (EAPs) to provide COVID-19 testing. It remains to be seen how long this type of guidance and relief will extend under a Biden administration.

**Social Determinants of Health/Health Disparities**

The COVID-19 pandemic and its disproportionate impact on people of color has shined a light on health disparities and social determinants of health. Addressing these disparities is expected to be a priority for the Biden administration and next Congress. The Biden-Sanders Unity Platform recommends “in the strongest possible terms that Democrats commit to ending health inequities by race, ethnicity, gender, and geography through a sustained, federal effort, led by Biden, that engages the whole of the government to solve health inequities that have long plagued us, including those that emerge from social determinants of health like inadequate housing, hunger, mass incarceration, and gun violence.” The Council’s ongoing work to address the social determinants of health and benefit plan inequities will seek to inform and help shape this important activity.

**Paid Leave**

The COVID-19 pandemic has renewed calls for federal paid leave legislation, and such legislation may be among the first orders of business of the Biden administration and Democrat-controlled Congress. Long-advocated Democratic proposals to require paid sick leave and paid family and medical leave for workers are likely to make it across the finish line with the Democratic sweep of the White House and Congress. Leading proposals include the Healthy Families Act, spearheaded by Representative
Rosa DeLauro (D-CT) and Senator Patty Murray (D-WA), which will ensure workers receive seven days of paid sick leave for routine personal and family health needs, as well as time for survivors of domestic violence and sexual assault to seek services. The FAMILY Act, sponsored by DeLauro and Sen. Kristen Gillibrand (D-NY) would provide workers access to 12 weeks of paid family and medical leave through the creation of a government-run program funded through employer and employee payroll deductions. The HEROES Act would extend the Families First Coronavirus Response Act emergency paid leave provisions to employers with 500 or more employees. Notably, none of these bills would preempt the growing number of state and local paid leave laws. The Council’s Statement of Principles on Paid Leave provides the framework for the Council’s continued advocacy that seeks federal legislation enabling uniform nationwide standards that preempt state and local laws and leverage private sector solutions.

The Biden plan calls for passage of the Healthy Families Act with the addition of an emergency plan that will require 14 days of paid leave for those who are sick, exposed, or subject to quarantines. The paid leave plan will create a federal fund to cover 100% of weekly salaries or average weekly earnings capped at $1,400 a week—the weekly amount that corresponds with about $72,800 in annual earnings. Biden’s emergency plan will provide reimbursement to employers or, when necessary, direct payment to workers for up to 14 days of paid sick leave or for the duration of mandatory quarantine or isolation, which will be in addition to existing paid leave provided by a business’s existing policies. The Biden plan also calls for permanently providing the type of comprehensive 12 weeks of paid family and medical leave envisioned in the FAMILY Act. Biden has also proposed $775 billion over 10 years for childcare and elder care. The American Rescue Plan specifically calls for restoring the emergency paid leave requirements of the Families First Coronavirus Response Act and eliminating the exemptions for employers with more than 500 and less than 50 employees. The plan would reimburse employers with less than 500 employees for the cost of this leave through a refundable tax credit, currently set to expire on March 31, 2021.

**REGULATORY ACTION**

Over the last several years, as legislation has stalled, there has been increased pressure and activity on the regulatory front. However, with most of the policy priorities in the Biden health care plan requiring law changes, and with the looming Supreme Court decision on the ACA, there is likely to be a shift in focus to legislation early in the new administration. Yet, the health-related provisions of the recently enacted CAA will require extensive regulatory activity implementing and explaining the new law.
Although legislation to respond to the COVID-19 pandemic and protect and build on the ACA will be an early legislative focus, there are several regulatory items to watch in addition to CAA implementation. One category worth monitoring is regulations that would undo Trump administration regulatory actions, but fall outside of the window for Congress to nullify through the Congressional Review Act, including the following:

**Health Care Nondiscrimination Rules**

The current administration substantially revised and narrowed regulations the Obama administration had issued to implement Section 1557 of the ACA, which prohibits discrimination on the basis of race, color, national origin, sex, age or disability in certain health programs or activities, which can include employer-sponsored plans to the extent they receive federal financial assistance (e.g., Medicare part D drug subsidies). Among other things, the present administration’s regulations eliminated the protections for gender identity, repealed certain notice requirements, and significantly reduced the scope of applicability. Subsequent to these rules being finalized, the Supreme Court issued a ruling, related to a different law, which indirectly calls into question the elimination of the protection against discrimination based on gender identity. Litigation challenging the regulations then followed, resulting in a preliminary injunction that remains in effect. Biden’s health care plan indicates a Biden administration will take action to undo these efforts. This could be pursued early in the new administration, as a result of (or in response to) the ongoing litigation, depending on the status of those cases when Biden takes office.

**Association Health Plans**

It is also possible that the Biden administration will revise or withdraw regulations, issued by the current administration, that expanded the ability of small employers to join together to offer health insurance as an “association health plan” and which were intended to provide more affordable coverage options to small employers by applying the less stringent large group market insurance rules. These regulations are the subject of ongoing litigation; the regulations were struck down by a trial court, but the appeals court has not yet ruled. It is possible that the Biden administration could effectively undermine these rules, which were perceived by some as by an end-run around the ACA, by declining to continue to defend the rules in court, although an opinion from the appeals court is expected shortly. Alternatively, the new administration could undo the current rules through the regulatory process. This is not likely to be a top-tier issue but there may be activity in the near term depending on the outcome and status of the ongoing litigation.
Short-term Insurance

The current administration expanded the maximum duration of “short-term” insurance policies, which are not subject to the ACA or general insurance market rules, to three years, up from the three-month maximum under Obama administration regulations. These rules survived a court challenge. However, due to concerns about these policies’ impacts on consumers and on the individual market risk pool, short-term policies are a likely target for yet another round of regulations, re-narrowing the duration and scope, likely in the near term.

At the same time, there are a number of health care regulations that we would not expect the Biden administration to overturn, although it is always possible that it will revise or refine any number of regulations. The most significant regulations in this category relevant to employers include:

Price Transparency

The current administration recently finalized regulations requiring group health plans and health insurers to meet certain price transparency disclosure requirements, including providing an on-line cost-sharing estimate tool and making public in-network negotiated rates, out-of-network allowed amounts, and certain drug costs. These regulations implement an ACA provision, which the Obama administration never implemented outside of the Marketplace and are intended to increase transparency for consumers and lower health care costs. Although the Biden health care plan does not emphasize increased transparency, it would be unexpected for the Biden administration to undo these rules, due to their basis in the ACA, their consumer focus, and their potential to address health care costs.

Individual Coverage HRAs

Consumer-directed health care has been a focus of the present administration, including in regulations allowing employers to provide employees with tax-free funds in health reimbursement arrangements to purchase individual insurance policies (individual coverage HRAs). The Obama administration had prohibited this practice by regulation, largely due to concerns about impact on the individual market risk pool if employers were to send only their highest risk employees to the individual market. Although the current administration undid this prohibition, it did so after years of developing guardrails intended to protect the individual market. These regulations were understood to be possibly beneficial to the individual market and were not subject to litigation. Because of the substance of the individual coverage HRA rules and the
expected Biden administration emphasis on strengthening the individual market, it is unlikely that action to undermine these rules would be a priority.

There are also a number of other regulatory items where prospects for future activity are uncertain.

Wellness Plans

On January 7, the Equal Employment Opportunity Commission (EEOC) released two proposed wellness regulations regarding permissible incentive limits under the Americans with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act (GINA), following litigation and withdrawal of regulations on this topic by the Obama administration. The prospects for those rules are unclear, in part because two new EEOC commissioners have recently been confirmed and the Biden administration may weigh in with new and different views.

Direct Primary Care Arrangements

Also outstanding are possible final regulations by the Treasury Department and the IRS on direct primary care arrangements, under which a health care provider agrees to provide primary care services to individuals for a fixed dollar periodic (often monthly) fee. Some employers offer these arrangements in addition to traditional health plans, to ensure primary care access in geographic areas where it is otherwise limited and to address affordability issues for lower income employees. The current administration made efforts to expand access to these arrangements but the regulations they proposed were narrow and did not allow individuals with direct primary care arrangements to contribute to HSAs, which is a significant outstanding issue. A hearing was recently held on the proposed regulations and many comments have been received. It remains to be seen whether these rules will be finalized before the end of this administration and, if not, whether they will ever be finalized.

High-Deductible Health Plans and Health Savings Accounts

Although historically, HSAs and HDHPs have not been a policy focus for Democrats, efforts to expand the types of services that can be covered pre-deductible in an HSA-eligible HDHP, such as primary care and treatment and management of chronic conditions, are expected to continue under a Biden administration. Ensuring access to these types of care is widely understood to be essential to improve health care and reduce health care costs and value-based care has broad support as well. In addition, in the Marketplace, many of the plans qualify as HDHPs. Consequently, relaxing the HDHP rules would allow more flexibility and improvements to some of the less expensive Marketplace plans, which could be appealing to the Biden
administration. Other HSA and HDHP changes, such as increasing the HSA contribution limit or allowing HSA contributions for those with non-traditional coverage, seem much less likely.

**Form 5500 Reporting**

The Obama administration made efforts to increase Form 5500 reporting, including for group health plans. Although those rules received resistance from the regulated community and were not finalized, and the current administration did not take action, it is worth monitoring whether the new administration might revive that project, although it is unlikely to be a priority.

**Sub-Regulatory Guidance Procedures**

Although not specific to health care, also significant to future regulatory activity are the current administration’s actions intended to limit inappropriate sub-regulatory guidance by federal agencies and increased efforts by the White House Office of Management and Budget to control, and be involved in, the guidance process. The White House required all agencies to implement more robust guidance procedures, which many agencies have done, and which while adding more chances for notice and comment could also slow down the guidance process. It will be interesting to see if the new administration rolls back any of those new procedures, in particular, if there are new major laws to implement, including the CAA, which, historically, have required avenues for rapid, responsive guidance, outside the confines of the formal notice and comment rulemaking process.

**Post-Regulatory Litigation**

Another process point to monitor is the extent to which new health care regulations that are issued by the Biden administration are litigated. Over the past four years, many health care regulations were litigated following finalization, such that the regulatory process seemed to include an extended “tail” period during which almost all regulations had to make their way through the courts. It may be the case that this is a new reality going forward and this practice will continue, but it may also dissipate, providing more finality to final regulations.

**Enforcement and Other Administrative Actions**

In addition to regulatory changes, there are also certain actions we expect the Biden administration to take that will not require regulatory changes or legislation but instead are administrative or enforcement related. Atop that list the Biden administration is
expected to increase funding for enrollment activities related to the Marketplace (e.g.,
funding for the “Navigator” program), which has been reduced the past few years.
Biden’s health care plan also indicates mental health parity enforcement will be
emphasized, but enforcement has continued at a steady pace so it remains to be seen
how much will change.