

Post-Election 2020: Healthcare Priorities Under a Biden Administration

PUBLISHED: December 14, 2020

The dust has settled and the 2020 election has concluded with former Vice President Biden poised to become president. At the same time, Democratic control of the House of Representatives has narrowed to the smallest margin in twenty years and one of the lowest margins for a first term president. Control of the Senate is still up in the air with runoffs on January 5, 2021 in the two Georgia Senate races.

In this memorandum, we look at the health care agenda of President-elect Joe Biden and the Democratic Party. Initially, a Biden Administration will focus most of its efforts on a robust response to the COVID-19 pandemic. It will also focus on taking administrative action to reverse some of the health policies implemented during the Trump Administration — such as the Association Health Plan regulation, short-term, limited-duration regulations and regulations under section 1557 of the Affordable Care Act (“ACA”).

Over the longer term, Mr. Biden’s healthcare platform involves protection and expansion of the ACA, including increased premium and cost-sharing subsidies in ACA Exchange plans, and providing for some form of a “public option” that would allow some portion of Americans to enroll in a Medicare-type insurance program. But these proposals will require legislative action, and the likelihood of passage will depend on the outcome of the Georgia Senate races. Indeed, the most far-reaching proposals — adding a public option and expanding eligibility for Medicare to age 60 — would be difficult to accomplish in most any scenario.

We summarize the likely elements of a healthcare policy agenda under a Biden Administration; whether and how those goals may be accomplished; and what they mean for plan sponsors, health insurance carriers and other service providers.

If you have any questions, please do not hesitate to contact your regular Groom attorney or the authors listed below:

Jon Breyfogle
jbreyfogle@groom.com
(202) 861-6641

Lisa Campbell
lcampbell@groom.com
(202) 861-6612

Zachary Isenhour
zisenhour@groom.com
(202) 861-0152

Tamara Killion
tkillion@groom.com
(202) 861-6328

Seth Perretta
sperretta@groom.com
(202) 861-6335

Ryan Temme
rtemme@groom.com
(202) 861-6659

Brigen Winters
bwinters@groom.com
(202) 861-6618

Healthcare Legislative Policy Proposals

During the 2020 campaign, the Democrats released the following policy documents:

- [The Biden Plan for Healthcare](#) (the “Biden Plan”). The Biden Plan is one of a series of policy documents released by the Biden campaign. The document lays out four tenets:
 1. “Give every American access to affordable health insurance;”
 2. “Provide the peace of mind of affordable, quality health care and a less complex health care system;”
 3. “Stand up to abuse of power by prescription drug corporations;” and
 4. “Ensure health care is a right for all, not a privilege for just a few.”
- [2020 Democratic Party Platform](#) (the “Democratic Platform”). The Democratic Platform lays out the official policy positions of the Democratic Party for 2020. It was approved by the delegates at the Democratic convention.
- [The Biden-Sanders Unity Task Force Recommendations](#) (the “UTF”). Shortly after securing the nomination, Vice President Biden and his chief rival Senator Bernie Sanders established a “Unity Task Force” to develop a set of policy recommendations. The UTF was submitted to the Democratic National Committee for consideration in the development of the Democratic Platform.
- [Joe and Kamala’s Plan to Beat COVID-19](#). The Plan to Beat COVID-19 offers seven steps or goals to reverse course or strengthen the federal response to the ongoing pandemic.

At a high level, the Biden Plan, Democratic Platform, and UTF are largely consistent on most key health policy issues. For example, all of the proposals take the following positions:

- Offering a public option;
- Eliminating surprise billing; and
- Tackling high prescription drug costs.

That said, there are some key differences between the various proposals. For example, the Biden Plan is silent on the issue of lowering the eligibility age for Medicare, while the Democratic Platform and the UTF both call for lowering it to age 60. Likewise, the Biden Plan does not mention expanding Medicare to cover dental, vision, and hearing benefits, while the Democratic Platform and the UTF both do.

Below, we summarize the key Biden positions, whether and how the administration could achieve its goals, and what the proposed changes might mean for plan sponsors, health insurers, and other plan service providers.

Public Option

- President-elect Biden intends to expand the ACA by making a public healthcare plan available through the ACA Exchanges. According to the Democratic Platform, a public option available through the ACA would:
 - Have no deductibles;

GROOM

- Be administered by the Centers for Medicare & Medicaid Services (“CMS”), as opposed to private insurance companies; and
- Contain cost controls for treatments obtained via CMS negotiations with providers and drug companies.
- The Biden Plan would offer premium-free coverage under the public option for those 4.9 million individuals who would have been eligible for the Medicaid expansion in the 14 states that have not expanded Medicaid eligibility, as permitted under the ACA. States that have already expanded Medicaid would have the choice of moving the expansion population to the premium-free public option as long as the states continue to pay their current share of the cost.
- Individuals making below 138% of the federal poverty level would be automatically enrolled in the public option when they interact with certain institutions (such as public schools) or other programs for low-income populations (such as SNAP – Supplemental Nutrition Assistance Program).

GROOM INSIGHT. Passage of a public option would be a difficult political lift even if Democrats control both the House and the Senate. Without control of the Senate, enactment of a public option or Medicare expansion is extremely unlikely. That said, all three plans (i.e., the Biden Plan, Democratic Platform, and UTF) are silent on some of the important decisions that Congress must make in designing a public option. If the public option were to get traction, a key question would be the manner in which providers are reimbursed under the public option. During the Democratic presidential primary, a number of nominees supported various forms of a public option with reimbursement rates set at some combination of Medicaid rates, the current Medicare rate and the aggregate rate paid through Exchange-based qualified health plans. The extent to which the public option reimbursement rate deviates from current commercial coverage options would drive the impact on both insurers and employer-sponsored coverage. For insurers, the lower the public option reimbursement rate the greater the price competition for their existing coverage. For both insurers and employers, a similar dynamic applies where a lower-cost public option could result in younger, healthier individuals opting for public option coverage in lieu of more robust, but costlier employer-sponsored and commercial coverage. This could lead to both increased premiums and cost of coverage due to worsening risk and ultimately weaken the commercial markets and employer-sponsored coverage system.

Expansion of ACA Subsidies

- The Biden campaign has proposed expanding the current ACA premium tax credit and cost-sharing subsidies for coverage through an ACA Exchange as follows:

GROOM

- Eliminating the 400% of the federal poverty level household income cap on premium tax credit eligibility;
- Lowering the maximum cap on the premiums that subsidized households must pay from 9.86% of income to 8.5% of income; and
- Increasing the size of premium tax credits by calculating them based on the cost of a gold plan (80% actuarial value) instead of the second-lowest-cost silver plan (70% actuarial value).

GROOM INSIGHT. Proposals to expand and reshape the subsidies have the chance of being politically more popular, although Congressional Republicans are very unlikely to support broad expansions. Nevertheless, it is an incremental ACA improvement that could be supported by consumer groups, as well as some employer and insurer constituencies. If the Senate turns Democratic, this change could also happen in a budget reconciliation bill passed with only Democratic votes. Such proposals could, however, be costly.

Impact on Employer Coverage

- Importantly, the Biden Plan indicates that the subsidies for ACA Exchange coverage would be available even to those who have been offered employer coverage that is affordable and provides minimum value under the ACA test.
- The public option also would be available to individuals who have been offered employer-sponsored coverage.
- The Biden Plan states that employees offered family coverage by their employer that can get a better deal with subsidized Exchange coverage under the proposed new 8.5% premium cap could opt for such coverage.
- It thus appears that the Biden Plan would eliminate the ACA's "firewall" for employees who are offered "affordable" employer-sponsored coverage.

GROOM INSIGHT. Eliminating the ACA firewall combined with decreasing the premium cap and increasing the cost-sharing assistance provided for out-of-pocket costs (as a result of basing premium subsidies on gold plans as well as cost-sharing subsidies for lower income individuals) could result in millions of employees opting out of employer-sponsored coverage. Some "think tanks" have estimated that tens of millions of employees could opt out of employer-sponsored coverage as a result of the proposed Biden Plan changes.

GROOM

- The Biden Plan does not specify whether it would leave the employer shared responsibility mandate in place, but changes would be required if the subsidy and firewall elimination proposals were enacted.

Medicare Eligibility and Benefits

- During the campaign, President-elect Biden and the Democratic Platform proposed reducing the Medicare eligibility age from 65 to 60. The proposal would allow eligible individuals to choose between the public option, their employer-provided plan, or enrolling in Medicare when they reach age 60. The cost would be financed out of general revenues, not the Medicare Trust Fund.

GROOM INSIGHT. Like the expansion of the ACA premium tax credit subsidies, the expansion of Medicare to those who have reached age 60 could further incent employees who have been offered employer coverage to opt out of coverage. This could result in employers and insurers shedding some of their costlier risk, which might counter-balance some of the deleterious impacts of the public option on premium rates and risk profiles.

- The Democratic Platform and the UTF also call for an expansion of Medicare to cover dental, vision, and hearing benefits.

Reducing Prescription Drug Costs

- Reducing prescription drug prices is another key element of the Biden Plan. It proposes repealing the law that prevents the Medicare program from negotiating drug prices with drug companies.
- It also proposes the establishment of an independent board to set reasonable prices based on the average price in other countries, with the established prices applying in Medicare and the public option and available for Exchange plans.
- In addition, President-elect Biden has proposed:
 - Limiting price increases for name-brand and biotech drugs and “abusively priced” generics to the rate of inflation and requiring drug companies to adhere to this limit in order to participate in the Medicare program and to avoid potential tax penalties;
 - Allowing the importation of prescription drugs from other countries;
 - Eliminating the current deduction for prescription drug advertising; and
 - Encouraging the accelerated development and introduction of generic drugs.

GROOM INSIGHT. Many of the proposals in the Biden Plan overlap with provisions in the comprehensive drug pricing legislation passed by the House in the 116th Congress (H.R.

GROOM

3, the Elijah E. Cummings Lower Drug Costs Now Act). The Senate Finance Committee and Health, Education, Labor and Pensions Committee also approved less far-reaching prescription drug pricing bills this Congress (S. 2543, the Prescription Drug Pricing Reduction Act and S. 1895, the Lower Health Care Cost Act, respectively). That said, the Medicare negotiation and independent board price setting proposals in the Biden Plan are very unlikely to gain the support of Congressional Republicans and would only have a chance of enactment if Democrats control the Senate.

Eliminating Surprise Billing

- The Biden Plan aims to “bar health care providers from charging patients out-of-network rates when the patient doesn’t have control over which provider the patient sees (for example, during a hospitalization).” The Democratic Platform and UTF also generally support outlawing predatory surprise billing. (Note that Congress is currently considering adding bi-partisan surprise billing legislation to a year end funding package.)

Antitrust

- The Biden Plan indicates that it will use existing antitrust authority to address the concentration of market power in the hospital provider, insurance carrier, and pharmaceutical company industries, which it believes is driving up prices for consumers by undermining market competition.

Mental Health Parity

- The Biden Plan says it intends to double mental health parity efforts to ensure enforcement of the mental health parity laws and expand funding for mental health services, building on efforts of Vice President Biden during the Obama Administration.

Reversing Regulations and Trump Administration Executive Orders

It is also very likely that the Biden Administration will take regulatory actions to unwind regulations and Executive Orders issued by the Trump Administration that it views as undermining the ACA. For example, it is likely that the Biden Administration will seek to unwind the following:

- *Short-term, limited-duration plans* – Under a final regulation issued in 2018, the Trump Administration expanded the definition of short-term, limited duration plans that are exempt from the ACA essential health benefit and other market reforms to include plans with an initial term of up to a year and that are renewable for three years. The Biden Administration is likely to revisit and reverse, in whole or in part, the 2018 final rule.
- *Association Health Plans* – A June 2018 Department of Labor final regulation expanded the universe of arrangements that can qualify as an association health plan (“AHP”) for purposes of ERISA and also applies large group treatment to qualifying AHP coverage. It did so by

GROOM

broadening the criteria under ERISA for determining when employers may join together in an association that is treated as the ERISA “employer” of a single group health plan and by allowing certain self-employed persons to be treated as employers for this purpose. The Biden Administration may seek to reopen and reverse the final AHP regulations.

- *Expanding ACA Section 1557 Nondiscrimination Rules* — The Trump Administration made sweeping changes to limit the scope of the ACA section 1557 provision. But the one change that will surely be reversed is the elimination of protections for transgender individuals.
- *Expanding Navigator Funding and Enrollment Periods* — The Trump Administration dramatically cut funding for the Navigator program, which serves to provide outreach and assistance in enrollment, and shortened the open enrollment period for insured coverage. A Biden Administration likely will reverse course here, and it could also liberalize special enrollment periods (“SEPs”).

It is less clear that the Biden Administration will revisit the following rules:

- *Health Reimbursement Accounts* — In June 2019, the tri-agencies issued final regulations regarding health reimbursement arrangements (“HRAs”) and other account-based group health plans designed to make it easier for employers to provide health coverage to their employees through HRAs.
- *Transparency Rules* — In October 2020, the Departments of Treasury, Labor, and Health and Human Services (“HHS”) released a final rule that would require group health plans and health insurers to increase consumer price transparency, with the new disclosure requirements phasing in between 2022 and 2024.

COVID-19

The Biden Plan for COVID-19 sets forth the following goals to help address the ongoing global pandemic:

- Increasing testing and tracing, including doubling the drive-through testing sites, testing variety (e.g., at-home and instant testing), establishing an executive board to facilitate the increase in manufacturing and distribution of testing, and utilization of the U.S. Public Health Jobs Corps;
- Increasing federal production and supply of personal protective equipment under the Defense Protection Act, including expanded capabilities for future pandemic incidents;
- An additional stimulus package that includes funding for state and local governments, resources for schools, and small businesses;
- Investing \$25 billion in vaccine manufacturing and distribution, providing free-of-cost access for every American;
- A Nationwide Pandemic Dashboard and COVID-19 Racial and Ethnic Disparities Task Force, which would transition into a permanent task force;

GROOM

- Restoring the White House National Security Council Directorate for Global Health Security and Biodefense, relations with the World Health Organization, the federal pathogen-tracking program (i.e., PREDICT), and CDC tracing efforts; and
- Nationwide mask mandates.

Timing and Process

The timing and content of any legislation to implement these policies will be driven in many ways by the rules of the Senate. Even if the Senate is controlled by Democrats after the Georgia runoffs, absent a change to the existing filibuster rules, Senate Democrats will not have sufficient votes to overcome a filibuster. This means that their policies will require bipartisan support or passage under the budget reconciliation rules, which allow for passage with a simple majority if the legislation is pursuant to a Budget Resolution that includes reconciliation instructions. Those rules materially limit the subject matter of legislation that can be passed with a simple majority, largely due to the Byrd Rule, which requires that matters in a reconciliation bill be directly related to raising revenue or expending funds. Republican efforts to repeal and replace the ACA in 2017 failed to garner a majority in some respects because of the inability to include material substantive reforms as a result of this requirement.

If Republicans retain control of the Senate, then it is certain that the filibuster rules will not be changed. In addition, it is likely there will be no Budget Resolution and, therefore, a budget reconciliation bill will not be available for ACA or other budget and tax legislation. In any case, with a Republican-led Senate, legislation to shore up the ACA or address the COVID-19 pandemic will require cooperation by a Republican-led Senate.

From a timing perspective, we expect that addressing the COVID-19 pandemic will be the first legislative priority of the Biden Administration. After that, the prospects for statutory changes to bolster and expand the ACA will depend in large part on whether Democrats control the Senate after the two Georgia Senate seat runoff elections.

Conclusion

As the COVID-19 pandemic continues, we expect that legislative policies with pandemic-related measures are more likely to move quickly, while larger, systemic changes are likely to be considered later in 2021 and beyond.

President-elect Biden's longer-term plan for healthcare is built upon the foundation of the ACA. At this point, it seems like the proposed public option, Medicare expansion and broad expansions of the ACA premium tax and cost-sharing subsidies are unlikely to pass due to razor thin margins in the Senate, regardless of the outcomes of the pending runoff Senate elections in Georgia. Other components of Mr. Biden's legislative agenda, particularly a more limited expansion of tax subsidies, have a better chance at passage, particularly under a Democratic Senate. Important design details are, however, still to be determined, and those policy decisions will materially impact the extent to which

GROOM

GROOM LAW GROUP

these policy proposals, viewed as a whole, impact insurers and employer-sponsored group health plans.

GROOM