



Health Care Reform & the Supreme Court Decision: Implications for the Health Care Community

Presented by the Drinker Biddle & Reath
Government & Regulatory Affairs - Lobbying &
Advocacy Team, Health Law Group and
Employee Benefits & Executive Compensation Group

July 12, 2012

Drinker Biddle

Speakers:



Julie Scott Allen
Government Relations
Director



**Sarah Bassler
Millar**
Partner, Employee
Benefits & Executive
Compensation



**Anna Schwamlein
Howard**
Medicare Reimbursement
& Health Policy Director



Matthew Amodeo
Partner, Health Care

Moderator:



Ilisa Halpern Paul
Managing Government
Relations Director



Twitter - Live Coverage

- Join the conversation on Twitter during the event by following @DrinkerHealthGR and #dbrhealth
- Also, keep up-to-date by visiting our blog at www.capitolhealthrecord.com

Firm Overview



- 11 Offices Across the US
- 650 Lawyers and other Non-Lawyer Professionals, including Lobbyists, Public Policy Experts and Grassroots Advocacy Coordinators
- Founded in 1849

16 National Practice Groups:

Commercial Litigation
Communications Litigation
Corporate & Securities
Corporate Restructuring
Employee Benefits & Executive Compensation
Environment & Energy
Government & Regulatory Affairs
Health Law

Insurance Coverage
Intellectual Property
Investment Management
Life Insurance & Annuities
Labor & Employment
Private Client
Products Liability & Mass Tort
Real Estate



Issues Before the Court

- Anti-Injunction Act
- Individual Mandate
- Severability
- Medicaid Expansion



Anti-Injunction Act

- Issue: Does the Anti-Injunction Act preclude resolution?
- Court Rules (9-0): Tax Anti-Injunction Act does not apply – Court can rule on the other issues at this time



Individual Mandate

- Issue: Is the Individual Mandate constitutional?
- Court Rules (5-4): Yes – Under the taxing powers of the constitution
 - Not constitutional under Commerce Clause or Necessary and Proper Clause
- No need to rule on severability



Medicaid Expansion

- Issue: Are ACA provisions expanding Medicaid to cover those up to 133% FPL constitutional?
- Court Ruling: The federal government cannot withhold all state Medicaid funds when a state refuses to comply with the expansion. Only funds associated with the expansion can be withheld.



SCOTUS Decision: Implications for Providers

PPACA: LARGELY STATUS QUO



Key ACA Provisions Already in Effect

- Coverage Expansion
 - Interim pre-existing condition high risk pool
 - Temporary employer reinsurance program for non-Medicare eligible retirees
 - Mandatory coverage of dependents until age 26
 - No coverage exclusions for children with pre-existing conditions
 - No lifetime limits on health coverage
- Health Plans and Employers
 - Health plan annual reporting of medical loss ratios
 - Plans must provide coverage summaries to applicants and beneficiaries (Sept)
 - Patient -Centered Outcomes Research Trust Fund Fee: \$1-\$2/enrollee
 - Mandatory W-2 reporting: Employers must report cost of sponsored health coverage on employee W-2s



Already in Effect

- **Prescription Drugs and Devices**
 - Mandatory 50% discount for branded drugs in Medicare Part-D Doughnut Hole
 - Phase-in of federal subsidies for generics
 - Medicaid Drug Rebates are increased
 - FDA authorized to approve generics of biologic drugs
 - \$2.5B+ annual excise tax on pharmaceutical sales
 - No FSA/HSA coverage for over-the-counter drugs, unless prescribed

Already in Effect

- **Medicare Initiatives**
 - Center for Medicare and Medicaid Innovation (CMMI)
 - Pioneer ACOs
 - Bundled Payments for Care Improvement Initiative
 - Comprehensive Primary Care Initiative
 - Shared Savings Program (ACOs)
 - Hospital Avoidable Error and Readmission Payment Reductions (Oct.)
 - Market Basket Update Adjustments
 - Value Based Payment Program - 1% withhold (Oct.)

What's Ahead

2013

- **Providers/Suppliers**
 - Medicare Bundled Payment National Demonstration Pilot
 - Medicaid Primary Care Physician Fee Schedule Increase
 - 2.3% Sales Tax on Medical Device Sales
- **Consumers**
 - FSA Contributions capped at \$2,500
 - 0.9% Additional Medicare Tax on High-Earners (\$200-250K)
 - 3.8% Investment Income Tax for High-Earners



What's Ahead

2014

- **Providers**
 - Disproportionate Share Hospital (DSH) payment adjustments begin
 - Medicare Independent Payment Advisory Board begins recommendations
- **Consumers**
 - Individual and Employer Mandates take effect
 - State Insurance Exchanges begin
 - Elimination of excessive waiting period (>90 days) and Pre-Existing Conditions Exclusion for ALL
 - Elimination of annual limits on essential coverage
 - Limitations on annual cost sharing (deductible and out-of-pocket max) begin.
 - Medicaid expanded to all individuals under 65 with incomes up to 133% of the Federal Poverty Level (States may opt out of the expansion)
 - Premium credits and cost-sharing subsidies for individuals and families with incomes between 133% and 400 % of the Federal Poverty Level (FPL) begin

What's Ahead

2015

- **Providers**
 - Hospital Acquired Condition payment adjustments begin
- **Consumers**
 - States permitted to shift CHIPs enrollees to state exchanges with DHHS approval



What's Ahead

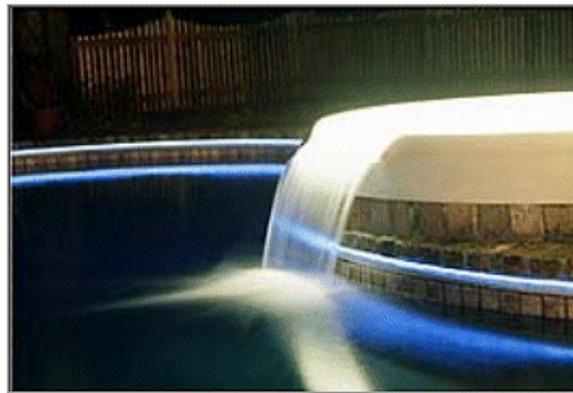
2016

- Penalties Increase for Individual and Employer Mandates

2018

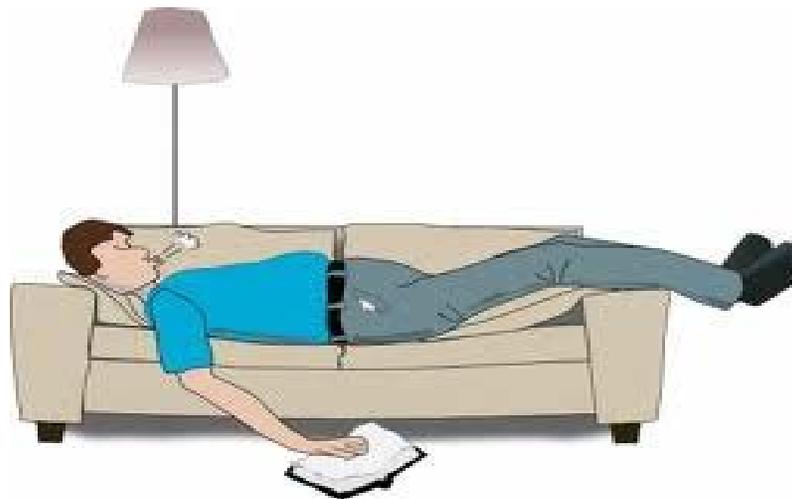
- Cadillac Tax 40% of Excess Benefit: \$27,500 for families; \$10,200 individuals

Spillover Effect



- Validation of PPACA likely to accelerate innovation in commercial market place:
 - Commercial ACOs
 - P4P programs
 - Payment bundles

SLEEPER ISSUE:



Medicaid Expansion



States Opting Out of Medicaid Expansion . . .

“...potentially disastrous outcome
for hospitals”¹

¹Bruce Siegel, Pres. National Association of Public Hospitals

Health Care Reform & the Supreme Court Decision | July 12, 2012 | 19

Drinker Biddle



Medicaid Expansion Covers:

- All U.S. residents under age 65
- Incomes between State's current eligibility level and 133% FPL
- 17 million people (assuming all 50 states opt-in)

In States Which Opt-Out of Medicaid Expansion...

➔ **400% FPL**

} Insurance
Exchange
Subsidies
Available

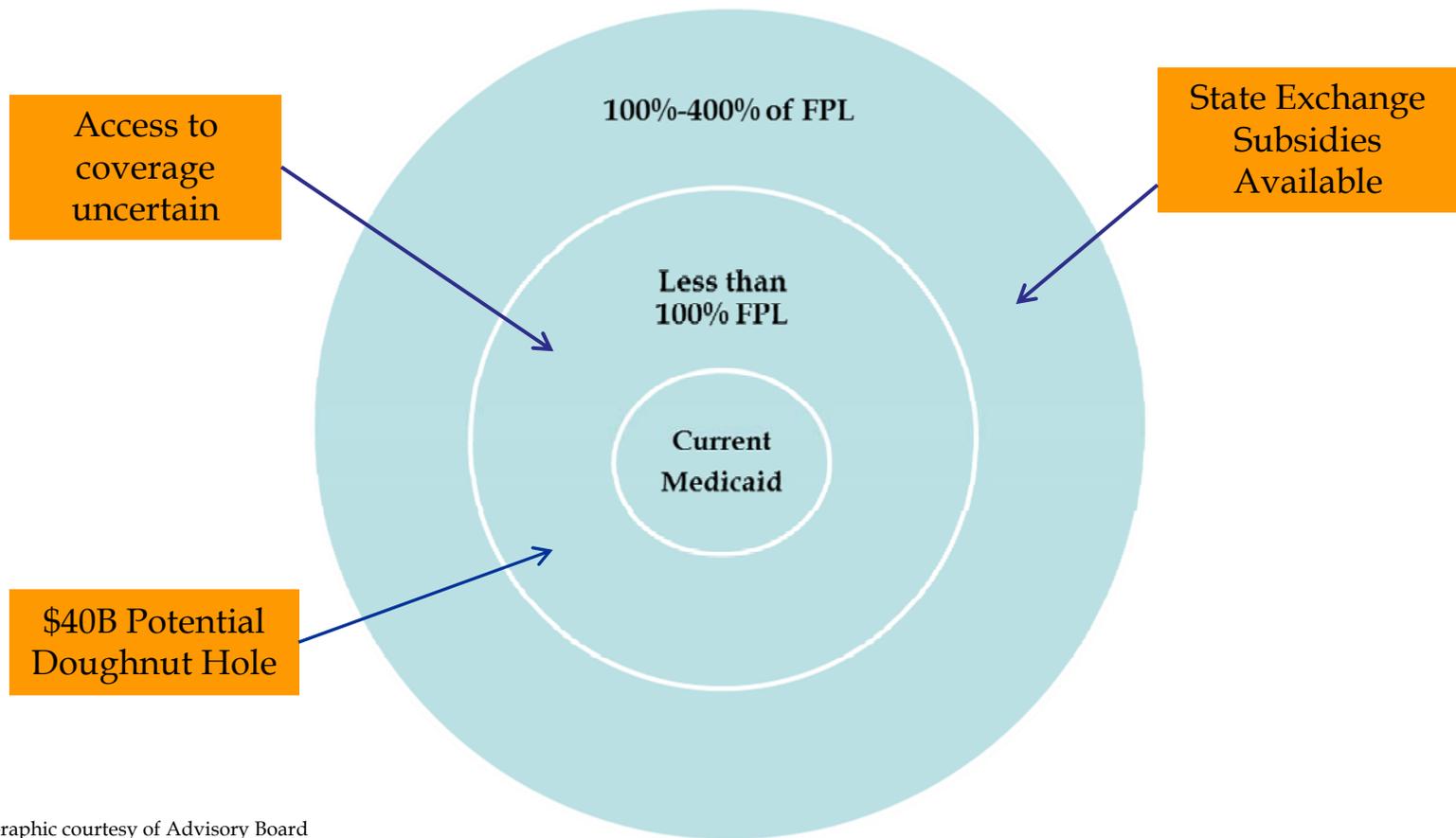
➔ **Federal Poverty Level (FPL)**

- No Medicaid Coverage
- No Insurance Exchange Subsidies Available

} \$40B
Potentially
Uncompensated
Care

➔ **State Medicaid Eligibility Ceiling**

Medicaid Doughnut Hole



*Graphic courtesy of Advisory Board



Drug Makers and Medical Device Manufacturers

Drug Makers:

- + Higher sales
 - Mandatory Medicare doughnut hole 50% discount on branded drugs
 - Excise tax (\$2.5B allocated based on market share)
 - Medicaid rebates

Medical Device Manufacturers:

- + Higher sales
 - 2.3% sales tax (2013)



After the SCOTUS Decision: Next Steps for Group Health Plan Sponsors



The Good News

- You Get to Keep the Money!
 - ERRP Amounts
 - Medical Loss Ratio Rebates
 - Small Business Health Care Tax Credits
- If your organization has already begun implementing PPACA, congratulations! Keep it up!



The Bad News

- Additional mandates for group health plans
- If your organization has delayed compliance efforts (even a little bit), you may need to play catch up
- Guidance is needed on many issues:
 - contraceptive coverage – how mandate applies to religious employers
 - automatic enrollment
 - definition of “essential health benefits”
 - whether coverage offered to employees meets the “minimum value” in the law (“pay or play”)
 - how to calculate plan “value” for purposes of applying the 40% excise tax (“Cadillac tax”)



What Should Plan Sponsors Do Now?

- Grandfathered plans need to be able to document status (audit risk)
- Lost or losing grandfathered status? Pay attention to additional mandates, including:
 - Choice of provider requirements
 - Emergency services coverage requirements
 - Preventive care with no cost-sharing
 - Enhanced appeals process (internal and external review)
 - Reporting whether coverage is minimum essential coverage (2014)
 - Limits on cost sharing (2014)
 - Non-discrimination rules for insured plans (TBD)



What Should Plan Sponsors Do Now?

- Prepare and distribute Summary of Benefits & Coverage (SBC) (9/23/2012) or pay the price (\$1,000/failure)
 - Which plans and how many SBCs?
 - Who is preparing it (employer, insurer or third-party administrator (TPA))?
 - Can and should the template be “tweaked”?
 - How does the SBC “fit” with other plan communications?
 - How will it be distributed (paper or electronic)?
 - What is the process for ongoing compliance (prospective notice of updates required)?



What Should Plan Sponsors Do Now?

- Implement \$2,500 limit on Health FSAs
 - Effective for *plan years* beginning on or after 1/1/2013 (coordinating rule for grace periods)
 - Amendments required by 12/31/2014
- Prepare to report value of plan coverage on 2012 W-2s (Box 12, using Code DD)
 - Applies to most group health plan coverage, some exceptions
 - Work with payroll (internal and/or external service provider)



What Should Plan Sponsors Do Now?

- Prepare for the Patient-Centered Outcomes Research Trust Fund Fee
 - Non-government entity to review, evaluate and compare clinical effectiveness research (on medical treatments, services, procedures, drugs and other strategies)
 - Annual fee of \$2/covered individual (\$1 for plan years ending on or after October 1, 2012 and before October 1, 2013)
 - Multiple calculation methodologies
 - File IRS Form 720 “Quarterly Federal Excise Tax Return” by July 31, 2013 and each July 31 thereafter



What's Coming in 2013?

- Increase of the FICA Medicare Tax Rate
- Elimination of Medicare Part D Subsidy Deduction
- Notice of Insurance Exchanges
- Expansion of HIPAA Electronic Transaction Rules



What Should Employers Do Now to Prepare for 2014?

- Understand the additional mandates that will become effective, including:
 - Automatic enrollment
 - Certify FTE access to minimum essential coverage
 - Limits on waiting periods and ALL pre-existing condition exclusions (PCEs)
 - Limits on cost sharing
 - Eliminate ALL annual dollar limits on essential health benefits
- Wellness programs: take advantage of increase in maximum reward (30% beginning in 2014)



What Should Employers Do Now to Prepare for 2014?

- Penalties apply to employers with 50 “Full-Time Employees”
 - “No Coverage” Penalty (\$2000/FTE/year)
 - Excludes first 30 FTEs and non-FTEs
 - “Unaffordable Coverage” Penalty (\$3000/FTE/year)
 - Only assessed if FTE obtains subsidized coverage
 - (Free Choice Vouchers Eliminated)



What Should Employers Do Now to Prepare for 2014?

- Determine whether at risk for penalties:
 - How many FTEs? (note proposed look back/stability period > will need an administrative process; new hires may be treated differently)
 - Are any of these FTEs eligible for subsidized coverage? (IRS proposed safe harbor for individual's W-2 wages)
 - Will it be “cheaper” to just pay the penalty and drop health plans? (consider tax implications, employee relations, need for coverage due to individual mandate, recruiting/retention issues)



What Should Employers Do Now to Prepare for 2014?

- Prepare for Transitional Reinsurance Program Fee
 - Purpose: reduce uncertainty of insurance risk in individual market during early years of exchange
 - Insurers and TPAs must pay (likely cost passed along to employer plan sponsors)
 - \$25 billion to be collected between 2014-2016; HHS to set national contribution rate; states may collect additional contributions



What does the decision mean for patients and consumers?



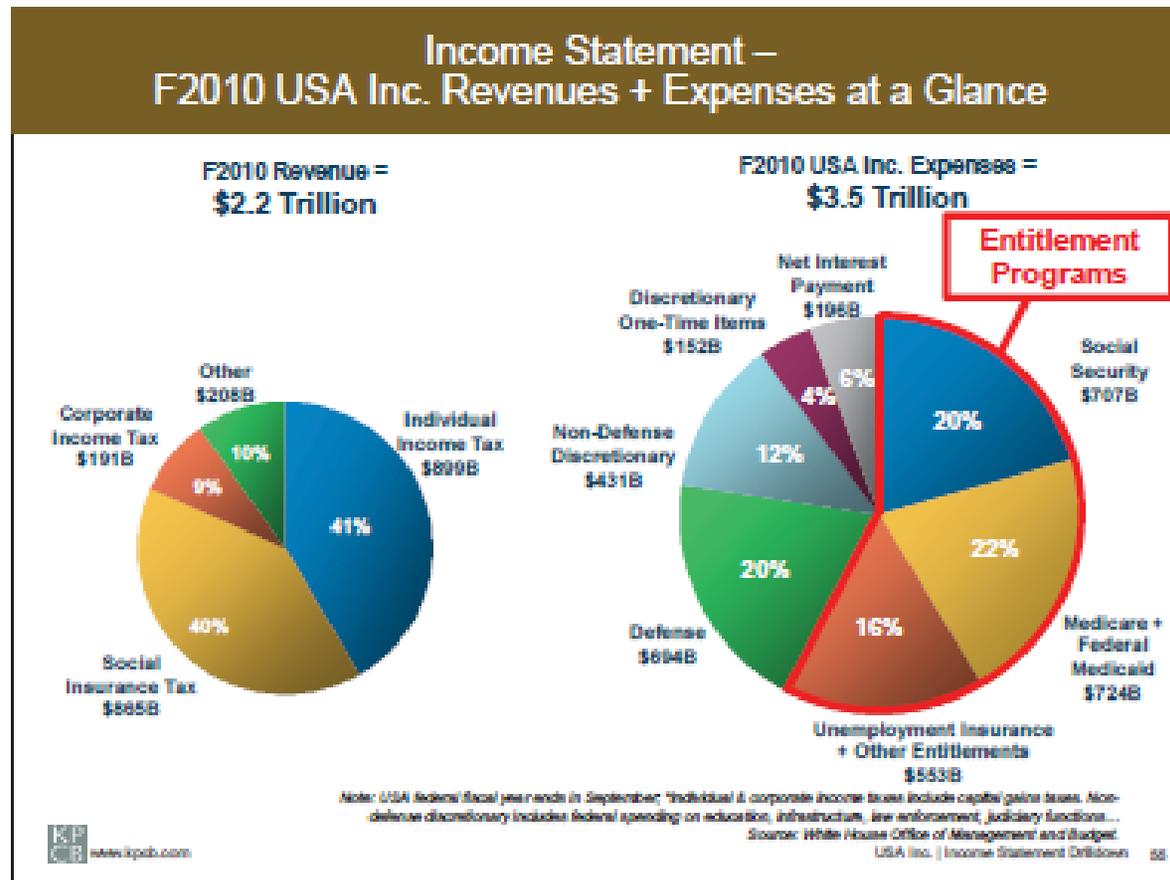
What does this mean for patients/consumers?

- Patient safeguards remain intact
- With individual mandate intact, provider discontent from uncompensated care limited
- Medicaid coverage available to all qualifying beneficiaries under age 65 up to 133% FPL – if states go forward
- Subsidies/tax credits continue to exist – if funding available
- State health exchange markets will exist – if states go forward



Political Crystal Ball - The Implications

Political Crystal Ball – 2012 and beyond ... the White House, Congress and the States



This information was reprinted with permission from Kleiner Perkins Caufield & Byers and can be found at <http://www.kpcb.com/insights/usa-inc-full-report>.



The White House/Administration – Now and After November Elections

Now:

- Rapid issuance of regulations/ guidance to implement programs and demonstrations
- Promotion of law's benefits with electorate
- Work to keep the Congressional Democrats on message and in line

After Elections:

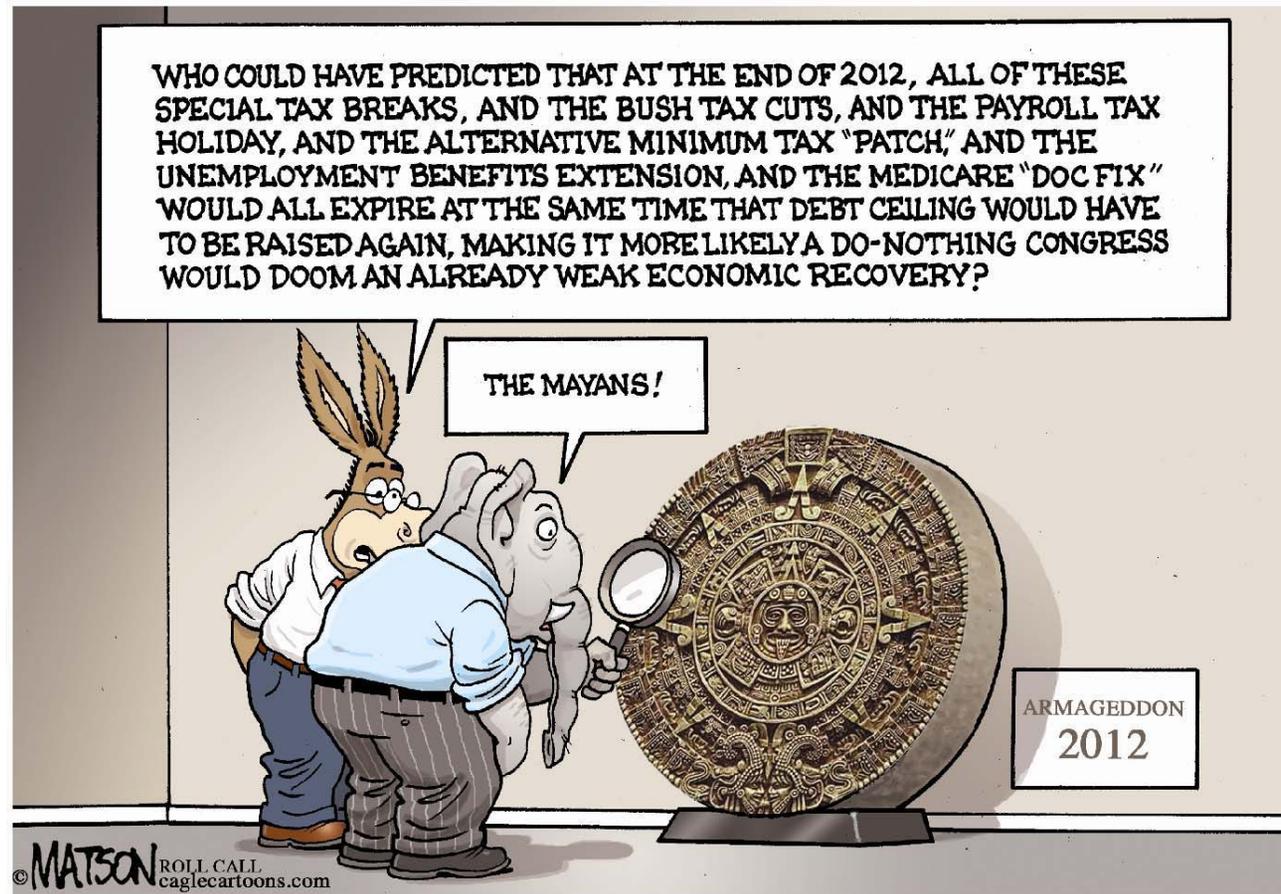
- (If) Obama is re-elected – continue on current implementation track, as much as the Congressional make-up will allow
- (If) Romney is elected – seek to carry out pledge to repeal, or otherwise dismantle, the law in part or in whole, as much as the Congress will support



The Congress – Between Now and November

- House voted to repeal the law again
- Use of appropriations process to limit funding for implementation of the law
- Use of the law's provisions as offsets
- Republican messaging: “the largest tax increase on the middle class in history”
- Democratic messaging: “this law improves everyone's life”

The Congress - Post-Election Lame Duck Session



The Congress - 2013 - It Depends

- Opponents expected to target unpopular and controversial provisions of the law
 - Piecemeal repeal
 - Defunding
- Law may play into entitlement reform

GOP Control

- Budget Reconciliation repeal strategy – securing 51 votes in the Senate

Split Control

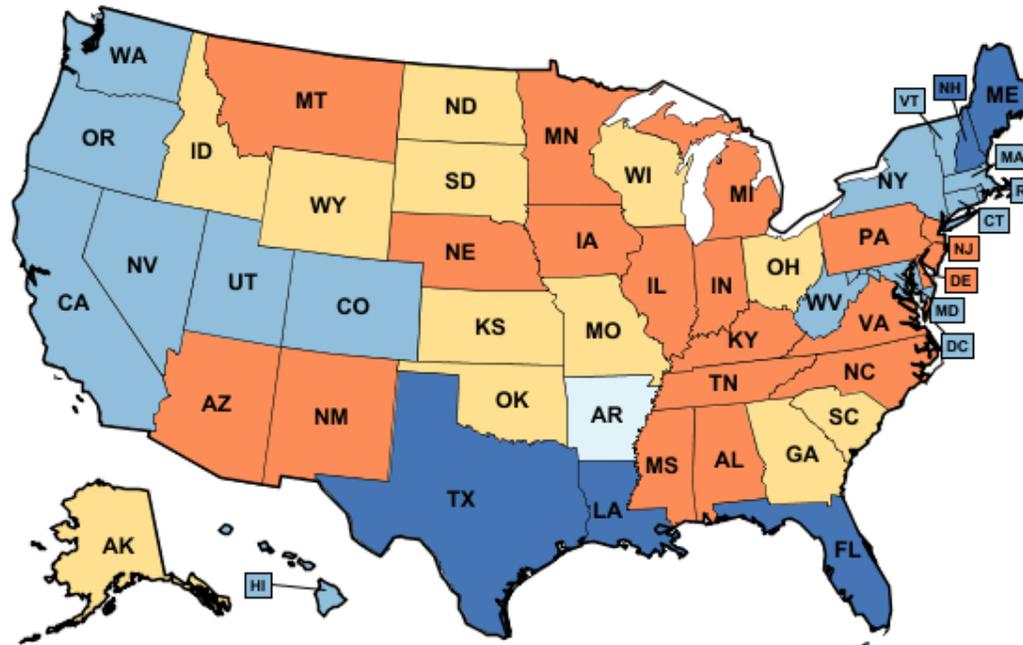
- Republican alternative proposals to reform expected – using partnerships with state legislatures



The States - Exchanges and Medicaid Expansion

- The States are in the driver's seat
 - Medicaid expansion funded primarily by feds
 - State flexibility
- Many states hostile to Medicaid expansion (26 filed suit)
 - States fear decline of federal funding to support expansion, given federal budget
 - State health exchange development mediocre at best – possible implementation delays

State Progress on Exchange Implementation



- Studying Options
- No Significant Activity
- Planning for Partnership Exchange
- Established State Exchange
- Decision Not to Create State Exchange

State Action Toward Creating Health Insurance Exchanges, as of July 9, 2012: Status of State Action



This information was reprinted with permission from the Henry J. Kaiser Family Foundation. The Kaiser Family Foundation, a leader in health policy analysis, health journalism and communication, is dedicated to filling the need for trusted, independent information on the major health issues facing our nation and its people. The Foundation is a non-profit private operating foundation, based in Menlo Park, California.

Questions?



Follow us on Twitter: @DrinkerHealthGR



Visit our blog: www.capitolhealthrecord.com

Contact Information

Ilisa Halpern Paul, MPP
Managing Government
Relations Director
ilisa.paul@dbr.com
202/230-5145
Twitter: @IlisaPaul

Sarah Bassler Millar
Partner, Employee
Benefits & Executive
Compensation
Sarah.Millar@dbr.com
312/569-1295

Matthew Amodeo
Partner, Health Care
Matthew.Amodeo@dbr.com
518/862-7468

**Anna Schwamlein
Howard**
Medicare & Health Policy
Director
anna.howard@dbr.com
202/230-5681

Julie Scott Allen
Government Relations
Director
julie.allen@dbr.com
202/230-5126