

## What Will 2017 Bring to Seniors and Persons with Disabilities?

Donald Trump's election and Republican majorities in both houses of Congress surprised much of the nation. With control of legislative and executive branches of government, the expectation is Republicans will finally be able to push through long-awaited legislation, as well as follow through on promises made by candidate Trump. And they are expected to move quickly.

This issue of *ElderCounselor* summarizes some key issues to watch out for in 2017 that affect seniors and persons with disabilities.

### What the Election Outcome Means in Congress

The House has remained in Republican control—about 45% Democrat and 55% Republican. The majority rules, so while the Democrats may have loud opposition, they don't have a lot of power. Currently, Republicans are mostly united, but those in the Freedom Caucus (Tea Party Republicans) are deciding how they will interact with the Republican establishment. If they split, votes may be needed from Democrats to pass legislation.

The Senate is 48 Democrats and 52 Republicans. 60 votes are needed to prevent a filibuster (where senators can talk for hours and delay votes). But with budget reconciliation, only a simple majority (51) is needed to pass legislation in the Senate. Because they are all budget-related programs, the Republicans will try to reform Medicaid, Medicare and the Affordable Care Act (Obamacare) through budget reconciliation. Individual Republican senators will have a lot of power, as some may insist on additions or deletions to secure their vote. If the Republicans do not stick together for the majority, votes may be needed from Democrats. (Note: Budget reconciliation was used to pass the Deficit Reduction Act of 2005 and OBRA 93, which enacted big cuts that changed elder law—the lengthening of the transfer penalty, the change in the time of when that penalty applies, the move from trust.)

One thing to watch is who is going to run Health and Human Services (HHS), Centers for Medicare and Medicaid Services (CMS) and the Social Security Administration, especially considering how much is related to Supplemental Security Income (SSI). The people now in charge of staffing these agencies are conservative. For example, the person in charge of staffing the political positions at the Social Security

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Administration has called for privatizing Social Security in the past. Donald Trump has repeatedly said he doesn't want to change Medicare and Social Security, but that may be changing. (See below.)

### **Tax Policy**

Tax changes are expected as part of the budget reconciliation process. We are not sure yet if 2017 will bring major tax reform or just tax cuts, but tax rates are expected to decrease for both individuals and businesses. Candidate Trump called for elder care and child care tax deductions and/or credits. He has also stated his plan to eliminate the federal estate tax, then charge capital gains tax on everything over \$10 million, with exemptions for family farms and small businesses.

We may also see some changes to the ABLE Act (Achieving a Better Life Experience), which passed in December 2014 and amended Section 529 Plans. Currently, ABLE allows people with disabilities developed before the age of 26 and their families to set up tax-exempt savings accounts, which can be used to cover qualified disability expenses such as, but not limited to, education, housing and transportation. Revisions in 2017 may raise the age to 46, allow those working to put in more money, and allow rollovers of these accounts.

### **Medicare Reform**

President-elect Trump started by saying he was going to protect Medicare and Social Security. After meeting with House Speaker Paul Ryan, he said he will modernize Medicare. Reince Priebus, incoming chief of staff, recently insisted that Mr. Trump won't meddle with Medicare or Social Security. Instead, he has said he will focus on 1) improving the economy, which will reduce the debt and ease entitlement concerns and 2) save Medicaid, Medicare and Social Security without cuts while eliminating fraud, waste and abuse.

But he is already encountering resistance from Republicans, who for years have claimed that a major overhaul to Medicare and other entitlements are needed to ensure they don't go bankrupt; that entitlement reform is critical to reducing debt; and the longer they wait, the harder it becomes to solve the problems. Obama administration officials warned just last year that a central Medicare trust fund is projected to run out of money by 2028.

Yet Republicans are also encouraged by what some of the President-Elect's Cabinet picks could mean for future entitlement reform. Representative Tom Price (R-GA), who replaced Paul Ryan as Budget chairman and sought to overhaul entitlement programs, is Trump's pick for Health and Human Services secretary. Representative Mick Mulvaney (R-SC), a fiscal hawk and Freedom Caucus co-founder, will lead his White House budget office.

So, we will have to wait and see if President-elect Trump, his Cabinet members and leading Republicans will find a way to agree. Some reforming of Medicare may be part of the 2017 budget reconciliation, but with ObamaCare repeal and replace, tax reform and infrastructure as the immediate priorities, solving the decades-long problem of deficits in Medicare and Social Security will likely have to wait until after 2017.

In the meantime, we are seeing a tilt toward Medicare Advantage plans. These managed care plans (offered through HMOs) often have lower costs and provide benefits not covered by traditional Medicare

and Medicare Supplement Plans, such as health club memberships and preventative educational programs for those with diabetes and other chronic diseases.

A long-term goal for Medicare, which has been around since its founding in 1964, is premium support. Basically, the consumer would choose a plan from those offered through an exchange. The government would provide subsidies to companies, they would lower the premiums and then people would choose their plans. It's not likely that this will replace Medicare as we know it, but it is an idea being discussed.

### **Medicaid Reform**

President-elect Trump has called for block granting Medicaid. House Speaker Paul Ryan has called for it, too, and Republicans are looking at whether they can reform Medicaid through budget reconciliation.

Those who want to reform Medicaid are focusing on the FMAP, the federal percentage match that states receive through federal funding. This is based on per capita income of the state. For example, a rich state like New Jersey is a 1:1 ratio, while a poor state like Mississippi is about a 3:1 ratio. This means for every one dollar that Mississippi spends on Medicaid, they will receive three free extra dollars from the federal government. This can impact states' budget decisions. For example, if the governor of Mississippi needs to cut costs, he will more likely cut education or infrastructure by one dollar, rather than cut Medicaid spending by one dollar and lose the three free extra dollars.

The idea of block grants has been around for about 30 years. They are attractive because there are fewer federal rules to comply with and the states can use the money however they wish. But block grants shift more costs onto the states, and governors tend to oppose that.

Another idea floating around is a per capita cap, which would give the states a fixed dollar amount per individual, based on Medicaid standard lines (the blind, aged, and disabled children and adults). It was first proposed by President Clinton, who also wanted block grants. A per capita cap may force the states to control Medicaid costs over time, but there is also a demographic shift to consider—the medical needs and costs for an 85-year-old are much greater than for a 65-year-old. Nursing homes and aging disability provider groups have a huge stake in this and would likely oppose it, as would some governors.

The cost changes may not be felt right away, but they will be noticeable ten years from now and that's what Congress must plan for. There may be increased waiver flexibility for the states and provider taxes to offset states' losses. We may also see reforms to make it easier to manage care.

### **Affordable Care Act**

Republicans are already moving to repeal and replace Obamacare. The question is: How much will be repealed? There are several programs included in the ACA, not related to traditional health insurance, that are important to elder law attorneys and their clients. For example, Medicaid expansion, a kind of Medicaid reform, is part of the ACA.

The ACA also includes programs that work toward ending the institutional bias in Medicaid. One is *Community First Choice*, a state plan that provides home- and community-based services. Currently it has an extremely low-income threshold so it's a limited population, but it's a start.

Another is *Money Follows the Person*, which pays for transition services. For example, it could provide extra funds to help someone leave a nursing home, by paying for a housing coordinator to find an apartment, a roommate, buy basic furniture and so on.

We are moving toward home- and community-based service, which many people favor. How will that interact with Medicaid reforms? Because they are optional, some fear that with per capita caps, these services will be among the first to go. There may be more opportunities to expand these services through block grants because they allow more flexibility in what is offered. Along this line, Senator Chuck Schumer (D-NY) has introduced a bill called the Disability Integration Act, which would make home- and community-based services a civil right.

### **Other Medicaid-Related Issues to Watch**

*Limiting home equity:* This proposal, H.R. 1361, would take away the state option to expand the cap for single individual home owners. It would not impact people who have a community spouse living in the home or if you have a disabled child or a dependent under 21. New York and New Jersey have already implemented the home equity limit. California has not.

*Medical liability reform:* This could impact whether individuals get adequate access to personal injury settlements and funds that can be put into a special needs trust.

### **Long-Term Care Reform**

There has been a lot of discussion on Capitol Hill about picking up the pieces on long-term care. After a decade, the market has completely collapsed. John Hancock just withdrew, and Genworth was bought out by a Chinese private equity firm. Republicans and Democrats agree on the problem, but there doesn't seem to be common ground yet on a solution. The Senate Aging Committee is starting the process, which is a positive step. There are calls for catastrophic coverage, at least on the back end, and probably some sort of front-end coverage for two or three years. There may be some long-term care reform as part of Medicaid reform.

### **VA Benefit Rules**

The new rules have been delayed again until at least April, 2017. Fixing the VA is a Trump priority. An important piece to what will happen with the VA is who Trump names to head the VA and Veterans Benefit Administration (VBA).

### **Nursing home binding arbitration rules**

Nursing homes must comply with binding arbitration rules to have access to Medicare or Medicaid funds. NAELA has been working with others to push CMS to ban pre-dispute binding arbitration. The for-profit nursing home industry association is fighting it and recently won a preliminary injunction in a Mississippi district court (*American Health Care Association et al v. Burwell*). We do not yet know if the Trump Administration will appeal this ruling and continue with banning binding arbitration for nursing home contracts.

In *Kindred Nursing Centers Limited Partnership v. Clark* in Kentucky, the issue is whether federal arbitration acts overrule the state's arbitration acts. The state of Kentucky has a law that says in order to

waive the principal's constitutional right to a jury trial, the agent must be given that specific authority within the power of attorney. Whether this is overturned is likely to hinge on President Trump's pick to fill Justice Scalia's vacancy on the Supreme Court.

### **Conclusion**

There are a number of issues that will be addressed in 2017 that can have significant impact on seniors and their loved ones, Veterans, and persons with disabilities. If you have questions or would like to discuss any of the issues raised here, please don't hesitate to contact us.

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