So many changes to the health care law, but are they legal?

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WASHINGTON -- After President Barack Obama bowed to critics in November and allowed people with canceled health insurance policies to keep their coverage for another year, the White House quickly hit the spin cycle.

In a telephone briefing with reporters that same day, senior administration officials said their “enforcement discretion” allowed them to tweak the Affordable Care Act to ensure that it would be implemented with minimal disruption.

Previous administrations had done the same thing with complicated new laws, they said, and the slow-motion rollout of the sprawling health care law was sure to encounter more problems along the way.

“As we see them, we’re going to fix them,” a senior official said.

Over the next few months, the administration would see much that needed fixing. They twice changed the deadlines for people to enroll in coverage that began on New Year’s Day 2014. They granted two one-month extensions of a transitional insurance program for people with severe medical problems. They allowed people with canceled policies to seek hardship exemptions from the “individual mandate” – which requires most Americans to have health insurance – if they couldn’t find affordable catastrophic coverage.

And last week, the administration delayed – for the second time in less than a year – enforcement of the “employer mandate,” a key provision that requires employers to provide affordable health coverage to all full-time workers.

The mandate was supposed to take effect this year, but it was first delayed until 2015. Now midsize employers have until 2016 to comply. The administration also changed the rules to allow larger employers to phase in their new coverage requirements over the next two years.

The flurry of on-the-fly fixes has sparked outrage from Republicans and conservative legal activists who say the moves are executive power run amok – an illegal, politically motivated rewrite of the law.

"Scarcely a day goes by that I don't have a call or an email from someone who is trying to think about what the legal response to this could be," said Michael McConnell, a conservative law professor and director of the Constitutional Law Center at Stanford Law School. "It's really getting to the point where I just can't see how the attorney general can put his name to a legal opinion that this is lawful."

But the executive branch has great flexibility and discretion to make reasonable changes when implementing complicated new legislation. And that doesn't violate statutory law, said Simon Lazarus, a senior counsel at the Constitutional Accountability Center, a liberal think tank and public interest law firm. Nor does it violate the president's responsibility under the Constitution to "take care that the laws be faithfully executed," he added.

"Making sensible adjustments in the timing of the implementation of laws like this is precisely what the framers expected of a president when he is exercising his duty to see that the laws are faithfully executed," Lazarus said.

The so-called "take care" clause of the Constitution gives the president wide discretion to determine how and when to implement and enforce laws, he said.

"That means he may not robotically follow a particular statutory deadline if to do so would make the law less, rather than more, effective," Lazarus said.

But many say the latest employer mandate delay was more about politics than underlying implementation problems. The move conveniently removed a powerful Republican line of attack against vulnerable Democrats before next year's midterm election.

"How can they ever truly implement this program if they're going to back off every time the Democrats in Congress get nervous?," said Paul Ginsburg, a senior fellow at Mathematica Policy Research, a think tank. "It strikes people as a lack of fortitude in moving this forward."

It was politics, and early technical problems with the federal marketplace, that prompted the White House to allow canceled policies to be renewed for a year. And the administration might extend that even further.

"As we said in guidance back in November, 'We will consider the impact of this transitional policy in assessing whether to extend it beyond the specified time frame.' . . . No decisions have been made," Joanne Peters, a spokeswoman for the Department of Health and Human Services, said in a recent statement.

Even those who largely support the law are struggling to defend the latest holdup.

"I understand totally why they delayed it, given the reaction from business and the politics of it," said Jonathan Oberlander, a professor of health policy and management at the University of North Carolina at Chapel Hill. "But it does concern me that they took such a significant part of what was passed and said, 'We're just not going to do it this year,' and, 'We're not going to do it next year.'"

Administration officials have said their "enforcement discretion" allows them to mend or alter policies that ease the transition of a substantial change in the law. The employer mandate delays are a prime example. So is the Deferred Action for Childhood Arrivals program of 2012, which allows the government not to deport immigrants who were brought to the U.S. as children or who meet other specific requirements.

Much of the executive branch authority to make these kinds of changes in law without approval from Congress dates back to the New Deal era of President Franklin Roosevelt. A series of Supreme Court decisions created the "modern executive state," in which Congress passes a law and government agencies write the rules and regulations to implement it, said Roger Pilon, director of the Center for Constitutional Studies at the Cato Institute, a libertarian think tank.

In a recent appearance on CSPAN, Pilon explained:

"What Obama is doing is turning to his agencies – HHS, the IRS and so on – and giving them instructions as to how he wants this broad statute to be carried out, and he is doing it in ways that raise very serious questions about whether he is in fact rewriting the law. But the source of the problem, ultimately, is the vast amount of legislation that has been coming out of the Congress since the New Deal and especially after The Great Society in the 1960s. That's the root of the problem."

The Administrative Procedures Act of 1946 addresses the responsibilities of federal agencies in carrying out the laws passed by Congress. It authorizes federal courts to compel agencies to implement laws that have been "unreasonably delayed." Lazarus said that bypassing a statutory deadline is a factor to consider in determining if an agency has unreasonably delayed a law's implementation. But it's not the definitive factor, he said.

A 1984 case decided by the U.S. Court of Appeals for the District of Columbia also offers guidance on whether agency delays are unreasonable. In Telecommunications Research and Action Center v. the Federal Communications Commission, the court detailed several factors to weigh when determining what constitutes an unreasonable delay.

These include whether Congress has provided a timetable for the agency to proceed with the statute and what effect expediting a delayed action would have on the agency's higher or competing priorities. In addition, the court held that delays "that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake."

Lazarus said he believes the Obama administration would prevail in a legal challenge because the health care law delays have been transitional in nature and based on plausible concerns and rationale.

But an employee who wanted affordable job-based health coverage and was denied the opportunity because of the holdups in implementing the employer mandate may have standing to sue the government, said McConnell of Stanford Law School.

Most of the changes in the law and the adjustments stem from the difficulty of “trying to layer reforms on top of a byzantine health system,” said Oberlander of UNC-Chapel Hill. It didn’t help that the law’s passage required political concessions and compromises that made it even more unwieldy.

“To me, most of this is just learning as they go along and trying to fix new holes that spring up,” Oberlander said. “It just underscores how difficult health care reform is and the limits of the Affordable Care Act. And there are some very real limits.”