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Obamacare Forever?

What Barack Obama's second term means for the president's signature health law.

Peter Suderman - November 7, 2012

Since debate about health care reform began, voters have been consistently wary of the law that has become known as Obamacare; as of today, Pollster.com's aggregate shows that 47.8 percent of the public opposes the law while just 39.2 percent approve. Yet in voting to give President Barack Obama a second term yesterday, America also implicitly voted to keep the health law that bears his name in place. So is Obamacare here to stay?

Yes, at least for now. But big questions still remain. We know we'll keep Obamacare on the books, at least for the foreseeable future. What we don't know is whether it will work.

That's because the law still faces huge legal and logistical hurdles. Tops on the list are challenges to the law's insurance exchanges, starting with a lawsuit filed by Oklahoma's attorney general. That case, which revolves around legal problems examined in a paper by Case Western Reserve law professor Jonathan Adler and Cato Institute Health Policy Direct Michael Cannon, may decide whether employers in states that do not set up their own health insurance exchanges can be taxed under the law, as well as whether it is legal for the federal government to offer insurance subsidies through exchanges it runs in states that opt out. The law, which taxes employers that don't offer insurance in order to fund those subsidies, states that subsidies are only available in state-run exchanges.

If Oklahoma's suit prevails, states will have a large incentive to opt out of creating exchanges in order to protect employers from the tax penalty. And the federal exchanges will be largely useless. "No one would go to those exchanges. The whole structure created by the health care reform law starts to fall apart," Gretchen Young, senior vice president-health policy at the ERISA Industry Committee told Business Insurance.

The federal government faces other challenges to setting up its own exchanges as well. For one thing, there was no money appropriated to build the federal exchanges. Perhaps money can be found, but so far no one knows where. One adviser charged with helping Department of Health and Human Services create those exchanges has admitted that in order for HHS to build the exchanges, the federal government will likely have to "get creative about the financing." Implementation so far has been secretive and shoddy. Just this week, reports surfaced noting HHS may have improperly failed to disclose conflicts of interest in contracting with private insurers to help run the exchange.

The law’s state-run exchanges aren’t exactly proceeding as planned either. As of October, eight states have said they will not create exchanges at all. Many others have chosen to wait to begin the process. Less than a third of the states have definitively chosen to establish exchanges. And even those states actively trying to implement the law are having a tough time. California has faced delays and the likelihood of large premium hikes. The law says the exchanges are supposed to be ready for federal certification by the beginning of 2013. But the District of Columbia’s acting director of health reform, who is working to implement the law, told The Washington Post that, “No state is going to be able to be fully certified on Jan. 1. When they passed the ACA, they were highly optimistic about the timeline for states to implement exchanges.”

Highly optimistic is one way to put it. Delusional might be another. Those who oppose Obamacare are going to have to learn to live with the law. But those who support it are going to have to learn to live with its inevitable failures.