

May 1, 2012

New York Health Benefit Exchange Established by Executive Order

RESOURCE LINKS

Executive Order No. 42

<http://www.governor.ny.gov/executiveorder/42>

On April 12, 2012, Governor Andrew Cuomo issued Executive Order No. 42, titled “Establishing the New York Health Benefit Exchange” (“Order”). The purpose of the Order is to require the State of New York and its administrative agencies to take the steps necessary to establish an American Health Benefit Exchange and Small Business Health Options Program in New York (together, the “Health Benefit Exchange”). The Governor’s action was taken in response to the mandate contained in Section 1311 of the Patient Protection and Affordable Care Act (P.L. 111-148) (“ACA”).

IMPORTANT DATES

January 1, 2013

Date by Which New York Must Demonstrate to the Federal Government That It Has a Plan in Place

October 1, 2013

Date by Which the Health Benefit Exchange Must Be Prepared to Accept Applications

January 1, 2014

Deadline for the Health Benefit Exchange to Be Operational

Overview

The Governor issued the Order because the New York Legislature failed to enact legislation to begin development of the Health Benefit Exchange in New York. New York becomes the second state, after Rhode Island, to use an executive order to initiate compliance with ACA’s mandate to form a Health Benefit Exchange.

The Order expresses the position that the Health Benefit Exchange and other reforms will lower

premiums, provide access for individuals to federal tax credits and subsidies, and provide “one million additional New Yorkers access to affordable, comprehensive health insurance...”

Initial funding for the establishment of the Health Benefit Exchange will be provided by the federal government. By January 1, 2015, the Health Benefit Exchange must be self-sustaining.

To comply with ACA and to qualify for the federal funds, New York has until January 1, 2013, to demonstrate to the federal government that it will be prepared to have the Health Benefit Exchange ready to accept applications by October 1, 2013, and operational by January 1, 2014. New York residents would be required to participate in a federal exchange if New York fails to meet these deadlines.

The Order assigns to the New York Department of Health, working in conjunction with the Department of Financial Services and other state agencies, the responsibility for establishing the Health Benefit Exchange within the Department of Health, consistent with federal law. The Health Benefit Exchange will assume many functions, including facilitating enrollment in the individual market, assuring access for individuals to premium tax credits and cost-saving reductions, and enabling small businesses to receive tax credits.

The Health Benefit Exchange is empowered to contract with state, federal, and local entities to implement its mandate. Additionally, the Health Benefit Exchange is obligated to establish regional advisory committees – comprised of consumer advocates, small business consumer representatives, health care providers, agents, brokers, insurers, labor organizations, and other stakeholders – to make recommendations on the establishment and operation of the Health Benefit Exchange, and, in particular, to assure that the Health Benefit Exchange addresses regional differentials that would affect its operations. The advisory committees will also receive public input on Health Benefit Exchange-related issues.

What the Order Means

The purpose of the Health Benefit Exchange under ACA, as noted in the Order, is to facilitate health care reform, including compliance with the individual mandate, by making quality health care coverage more affordable, and more readily available. The Order assures that the development of the Health Benefit Exchange will be handled under the oversight of New York Health Department, as opposed to the federal government.

The Order does not address the fate of the Health Benefit Exchange if ACA is ruled unconstitutional, in whole or in part, by the Supreme Court of the United States. Interestingly, Section 5 of New York State Assembly Bill 8514 (one of the bills that failed to pass and was the companion to New York State Senate Bill 5849), introduced in the 2011-2012 Regular Sessions to establish the New York Health Benefit Exchange, provided that if ACA were to be determined to be unconstitutional, the New York Legislature would be required to convene within 180 days to “consider appropriate legislative options.” Perhaps a similar course of action would be initiated if ACA were ruled unconstitutional.

The Order leaves many unanswered questions, including the following:

1. What constitutes a “small group” for purposes of participating in the Health Benefit Exchange? ACA defines the term as 100 or fewer employees but gives states the option to use a lower number until January 1, 2016. New York law currently defines a “small group” as 50 or fewer employees. The legislation previously cited would use the “50 or fewer” definition until an adjustment to 100 is required to comply with the federal definition.
2. What constitutes a “qualified health plan”? The Health Benefit Exchange is required to offer only “qualified health plans.” These plans must be certified and recertified and, where necessary, decertified by the Health Benefit Exchange. The plans must be offered by a licensed health insurance issuer that offers coverage that complies with cost-sharing requirements and provides certain specified coverages.
3. How will qualified health plans be rated?

4. How will the Health Benefit Exchange coordinate with Medicaid, the Children's Health Insurance Program (also known as "CHIP"), and other state and local public programs?
5. Will New York offer only "essential" benefits as required under ACA or include the more generous "additional" benefits that it has the option to offer? Qualified health plans must provide for essential benefits, as determined by the federal government. In addition, a state may require the provision of additional benefits if the state assumes the additional cost of these benefits.
6. How will grants be awarded to "navigators"? ACA provides for navigators, which are entities that do the following: provide public information, distribute information, facilitate enrollment, provide referrals to governmental agencies, and supply information in a culturally and linguistically appropriate manner. Navigators are to be awarded grants by the Health Benefit Exchange.
7. What are the role and the composition of the regional advisory committees?
8. How will the Health Benefit Exchange utilize electronic connectivity to assure timely and seamless operations among the various participating entities and members?

As New York progresses along the track of developing the Health Benefit Exchange, it will need to address these significant issues, while adhering to the time frames mandated by ACA to be operational by January 1, 2014.

For more information about this issue of *IMPLEMENTING HEALTH AND INSURANCE REFORM*, please contact one of the authors below or the member of the firm who normally handles your legal matters.

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