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BGOV BILL SUMMARY: H.R. 748, 'CADILLAC' HEALTH PLAN TAX REPEAL (1)



Alexander Acosta, at an event in 2017, is leaving the Department of Labor. Photographer: T.J. Kirkpatrick/Bloomberg via Getty Images

News

# Obamacare Alternative Gets New Shot With Labor Chief Acosta Out (1)

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- *President displeased several weeks ago over labor secretary's inaction*
- *New acting secretary, Patrick Pizzella, could act on small business health plans*

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A powerful coalition of GOP state attorneys general is lobbying the Labor Department for a directive that would give them flexibility to expand cheaper alternatives to Obamacare.

They'll get a second chance with Patrick Pizzella about to take over the department when Alex Acosta departs on July 19. Louisiana Attorney General Jeff Landry, who's leading the coalition of states, said he's more optimistic about succeeding under Pizzella, a veteran GOP operative with a more aggressive reputation than Acosta.

The request comes as the Labor Department is defending a lawsuit over a regulation, known as the association health plan rule, that has a similar goal: reducing employers' costs for providing insurance coverage for their workers. A federal judge struck down that rule in March.

That rule, if eventually upheld on appeal, would allow small businesses to band together to create an expanded version of association health plans outside of the Affordable Care Act marketplace. Those plans don't have to meet all the requirements of ACA plans, but they could also be a less expensive option for small businesses and self-employed individuals.

What the attorneys general are asking for isn't an association health plan, but it would achieve a similar outcome, Landry said. They want to expand access to private health insurance across state lines. Specifically, they are asking the DOL to confirm the proposal is legal by issuing an advisory opinion to that effect.

Their request went all the way to President Donald Trump, who supports it. At least momentarily, the president was upset and surprised when informed that the DOL hadn't signed off on issuing the memo, according to several sources familiar with the exchange.

"He was extremely upset that it hadn't been taken care of," one person briefed on the discussion said. "He was like, 'You mean to tell me this didn't get done yet?'"

The White House and Labor Department didn't immediately provide Bloomberg Law with a comment.

## Need Legal Permission

Seven Republican state attorneys general wrote to Acosta in February seeking a DOL advisory opinion on employee benefits law, according to a [letter](#) obtained by Bloomberg Law. These opinions generally are used to inform the public of the administration's interpretation of a law and can be seen as a green light to move forward without fear of lawsuits.

The states want the labor secretary to say it's legal under the Employee Retirement Income Security Act for companies to pool resources with businesses in other states to sell insurance, Landry said in an interview.

Landry spoke to Bloomberg Law about the request before Acosta announced July 12 that he is stepping down. Landry subsequently confirmed that he intends to take the request directly to Pizzella and is more optimistic that Pizzella will take action when Acosta didn't.

The red states are seeking confirmation from the administration "that the law allows us to set this kind of program in place, allowing people to group by association," he said.

Landry met with Acosta and his team about the request after he sent the letter, but the agency's ensuing inaction led the attorney general to pitch the advisory opinion at a later meeting with White House staffers. According to Landry, that meeting took place a few weeks ago.

He recalled telling the White House aides, "Hey look we've got this letter out here and if you could help us get this to Secretary Acosta's attention—I know he's real busy—but if he could really just focus on this for just a split second, I think that he would find this is a remarkable opportunity to give us a path forward to lowering the cost of health insurance for the middle class and small business owners."

After the meeting, Landry mentioned the advisory opinion to White House Chief of Staff Mick Mulvaney. That's what led to Trump's dissatisfaction, the sources said.

Mulvaney has clashed with Acosta on various policy issues in which the chief would like to see faster, more aggressive deregulatory action favoring businesses. Acosta took a more cautious approach, which he said was necessary to ensure his actions stand up in court.

Mulvaney even usurped rulemaking power from Acosta [this year](#) by imposing a formal process under which he would personally settle disputes between Acosta's agency heads and White House assistants over regulations. But the health-care opinion was not a regulation, protecting Acosta from getting overruled and being forced to sign off on the request from the state AGs.

## 'Path Forward' for Health Care

The attorneys general said the advisory opinion would give the go-ahead for an alternative path to private, employer-sponsored insurance. More than 15 million self-employed or small business employees make too much money to qualify for Obamacare subsidies. Without subsidies, ACA plans can be prohibitively expensive.

Judge John Bates, of the U.S. District Court for the District of Columbia, struck down the DOL rule on association health plans. He called it an "end-run" around Obamacare and said it was an unreasonable interpretation of employee benefits law. He was appointed by President George W. Bush in 2001. The DOL is appealing his decision.

Before Acosta stepped down, top DOL officials were wary of granting an advisory opinion that may achieve a similar end to the rule Bates struck down, according to a source with knowledge of the discussions inside the agency.

While not outright opposed to the concept, Acosta and his team were concerned that granting the request from the attorneys general could complicate the ongoing litigation, the person said.

The attorneys general proposal is well developed and was drafted by a group with good intentions, the person said, but once an advisory opinion is issued, it can be replicated by people who don't have the best intentions.

Without guardrails in place, that can lead to misuse. Fraud and abuse plagued health plans similar to association health plans prior to the ACA's enactment. The health plans would be set up by fraudsters and collect payments from patients, only to leave them with the bill when they needed their insurance.

The association health plan rule, which opened the door for more small businesses to band together in associations and offer employees one collective health insurance option, was challenged by 12 Democratic attorneys general.

The plans created under the rule, which currently cover thousands of Americans, are still operational through a DOL guidance issued after Bates's ruling on how they could go forward during the pending litigation.

The Republican attorneys general praised the effort to expand the plans and chastised their Democratic colleagues for their challenge. Landry says there's still hope that at least one alternative to Obamacare could be achieved. Granting the advisory opinion would create an excellent chance to fulfill the president's vision of reducing health-care costs, Landry said.

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(Updated with the status of responses from the White House and the DOL.)

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