



The background of the slide is a photograph of the Lincoln Memorial in Washington, D.C. It shows several large, white, fluted columns of the neoclassical building. The sky is visible through the gaps between the columns.

# Welcome!

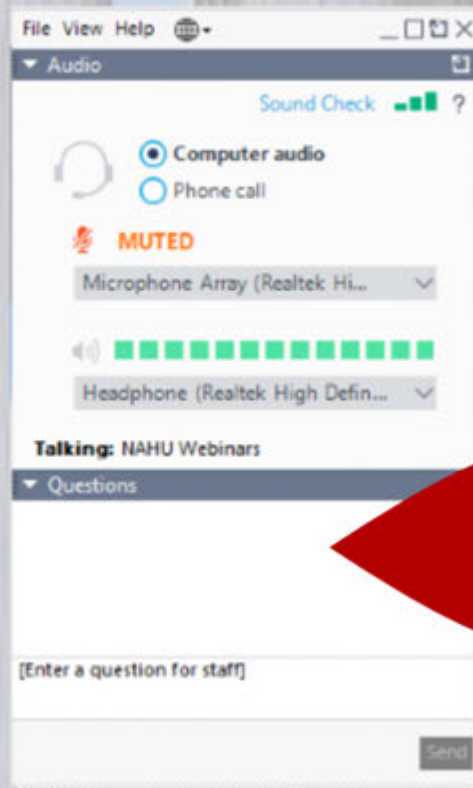
**RECORDING  
IN PROGRESS**

The slides are available  
for download in the  
handouts section





# Have a question for Marcy?



Ask it in the questions box at any time during the webinar.

We will address as many of these as possible at the end of the session.

# Please note:

The information herein should not be construed as legal or tax advice in any way. Regulations, guidance and legal opinions continue to change. The preparer has gathered public information and has attempted to present it in an easily readable and understandable format. Situations vary, technical corrections and future guidance may vary from what is discussed in the presentation.

This is meant for informational content only. The presenter makes no warranty of any kind concerning this information. You should seek the advice of your attorney or tax consultant for additional or specific information.

This presentation is not to be duplicated or distributed.

# Marcy Buckner

NAHU Vice President of Government Affairs



Marcy M. Buckner, J.D., is the vice president of government affairs with the National Association of Health Underwriters (NAHU). In this role, Marcy manages the association's state government affairs team, including the monitoring of activities of all state legislatures, insurance departments, and intergovernmental organizations to coordinate efforts to advance the interests of professional health insurance producers. In addition, she serves as the association's liaison to federal agencies such as the Department of Health and Human Services, Centers for Medicare and Medicaid Services, Internal Revenue Service, and the Department of Treasury. Marcy is also the staff liaison to NAHU's legislative management team, Legislative Council, and Legislative Council working groups.

Marcy received her Juris Doctor from New England School of Law in Boston, Massachusetts, and her Bachelor of Arts degree in Political Science and History from the College of Charleston in South Carolina.



# Health Reimbursement Arrangements

- Final rule released on June 13 with effective date of **January 1, 2020**.
- Establishes two new HRA options:
  - **Individual coverage HRAs:** Allows employers to offer an HRA to be used for the purpose of purchasing individual health coverage in lieu of a traditional group health plan; intended for employers not offering a group health plan.
  - **Excepted-benefit HRAs:** Allows funds to be used for other coverage options, to include STPs; Available only if employers offer a group health plan and employers are not permitted to offer employees **both** an HRA for purchase of individual health coverage and an HRA for excepted benefits.

# Individual coverage HRAs

- Allows employers to offer an HRA for tax-preferred funds to be used for the purpose of paying all or a portion of individual health coverage in lieu of a group health plan.
- Available on a class-by-class basis, with employers permitted to create classes of employees around certain employment distinctions, such as salaried workers versus hourly workers, full-time workers versus part-time workers, and workers in certain geographic areas.
- **Employers may offer either an individual coverage HRA or a traditional group health plan within an employee class, but may not offer employees a choice between the two.**
- Employers will be able to maintain their existing group health plan for current enrollees, with new hires offered an individual coverage HRA.
- These plans must be offered on the same terms for all employees in a class of employees, although employers may increase the HRA amount for older workers and for workers with more dependents.
- **HRA sponsors would need to provide a disclosure to employees** on the type of HRA being offered and to notify eligible participants that they would not be eligible for the ACA's advanced premium tax credits if receiving an HRA and enrolling in individual health coverage.



# Excepted-benefit HRAs

- **Permits an employer to offer employees an HRA for excepted benefits - but not individual coverage.**
- Employers are not permitted to offer employees both an HRA for purchase of individual health coverage and an HRA for excepted benefits.
- Permits employers that offer traditional group health plans to provide an HRA of up to \$1,800 per year, indexed to inflation, to reimburse an employee for certain qualified medical expenses, including premiums for short-term plans.
- **Excepted benefits must not be an integral part of the health plan, the HRA must be made available under the same terms to similarly situated individuals, and the HRA cannot provide reimbursement for premiums for traditional health insurance coverage.**
- This HRA could be available even if the employee doesn't enroll in the traditional group health plan.

# Potential Legal Challenges to HRA Rule

- Does the Trump Administration have the legal authority to issue the rule to substantively change the nature of HRAs without changes in statute enacted by Congress?
- Does this rule cause potential issues with discrimination among employee classes?



# Texas v. United States

The  
Challenge

Recent  
Actions

Compliance  
Considerations



# Texas v. United States (precursor)

The 2012 landmark Supreme Court ruling in *NFIB v. Sebelius* upheld the ACA as constitutional and the individual mandate as permissible under Congress's taxing powers.

The 5-4 ruling, led by Chief Justice John Roberts concluded that Congress could not force people to purchase health insurance but could tax those who fail to do so.

By upholding the mandate as a tax, the court did not consider the question of whether the ACA could exist if there was no mandate. This was potentially under review because the ACA does not include a severability clause to allow the law to exist if sections are struck down.

## Majority:

Roberts  
Ginsburg  
Breyer  
Sotomayor  
Kagan

## Dissenting:

Scalia  
Kennedy  
Thomas  
Alito

# Texas v. United States

The Trump Administration and Republican-led states argue that while the individual mandate was upheld as constitutional in the landmark 2012 *NFIB* case, that because the penalties have been zeroed out that there is no longer a tax being levied, and therefore, the mandate itself is not constitutional.

The intervenor states (Democratic AGs) argue that the zeroing out of the penalty is akin to a suspension of the myriad of other ACA taxes, such as the Cadillac/excise tax and health insurance tax, and that it is not repealed but merely not generating revenue—a condition that is not required under the Constitution.



# Texas v. United States

## Timeline of legal challenge





# Texas v. United States

## Supreme Court Preview

Since the 2012 *NFIB* ruling, two of the dissenting justices have been replaced by Trump-appointed justices. If the *Texas* case reaches the Supreme Court, it would still need to flip at least one of the majority-ruling justices who upheld the ACA and individual mandate in 2012.

### **NFIB Majority:**

Roberts  
Ginsburg  
Breyer  
Sotomayor  
Kagan

### **Dissenting:**

Scalia (seat now held by Gorsuch)  
Kennedy (seat now held by Kavanaugh)  
Thomas  
Alito



If courts strike the ACA, the Trump Administration would lose virtually all rule-making powers currently used for its healthcare agenda on prescription drug reform, opioid response, provider reimbursement, value-based care and cost containment efforts.

# Compliance Considerations

- The 5th Circuit Court's ruling is not final and the appeals process is expected to take several months, likely culminating in a hearing before the Supreme Court.
- Without a final ruling, the ACA continues to be the law of the land and compliance with the ACA is still being enforced.



# Association Health Plans

The  
Rule

The  
Challenge



# Association Health Plans

- Changes the definition of a bona fide association, allowing an association to be created for the purpose of offering insurance
- It must offer at least one other service for members, besides insurance coverage
- May be formed not just with groups that share a common interest, but also groups whose members are in the **same trade, industry, line of business or profession**, regardless of location or alternatively, to be based on **location**
- All employer members of the group would be counted together as a large group - each small employer would not have to be counted based on their own size
- Individual employers, as well as any of their individual employees could not be rated based on health status.
- It allows working owners, even if they have no other employees, to be considered as both the employer and employee and participate in the AHP
- **State laws are not preempted**. States have regulatory authority today over both fully insured and self-funded MEWAs. Self-insured plans also aren't exempt from all ACA requirements and most have comprehensive coverage.

# Association Health Plans

## Staggered implementation dates:

**September 1, 2018** - All associations (new or existing) may establish a fully insured AHP

**January 1, 2019** - Existing associations that sponsored an AHP on or before the date the final rule was published may establish a self-funded AHP

**April 1, 2019** - All other associations (new or existing) may establish a self-funded AHP

# Legal Challenge to AHP Final Rule

State of New York v. United States Department of Labor

In March, U.S. District Court Judge John Bates, a George W. Bush appointee, ruled that the Administration's efforts to expand the availability of health plans that don't meet the coverage rules of the ACA, and arguably violate ERISA, is a deliberate and illegal "end run" around the federal healthcare law.

Judge Bates specifically cited what many believe to be a direct violation of ERISA in the AHP rule's attempt to change the definition of employer to allow an association to be formed for the sole purpose of offering health insurance - as long as one other service is provided to members - and to allow working owners with no employees to be counted as both the employer and employee in joining a group AHP.

ERISA, signed into law in 1974, established standards for private-sector pension, health and other employee benefit plans, increasing protections for plan participants and their families.



# Status Pending Appeal

The Administration opted to appeal the lower court's ruling to the D.C. Court of Appeals and has not rescinded or revised the final rule.

The Administration released two rounds of guidance on the AHP rule pending appeal:

- April 2019 - Guidance confirms that state insurance departments continue to have the authority to oversee AHPs and that claims must be paid.
- May 2019 - Guidance confirms that AHPs cannot market to or enroll new members, although previously-existing AHPs are allowed to continue to operate.

**S. 1170** is currently pending in the Senate with 28 cosponsors (all Republican) that would codify the AHP rules into statute. It is **not** expected to become law under the current Congress.



# Short-Term Limited Duration Insurance (Short-Term Plans)

The  
Rule

The  
Challenge

# Short-Term Plans

- The final rule effectively ends the policy established by the Obama Administration in 2016 restricting the length of time for STPs.
- It restores the maximum duration of STPs to **up to 364 days** as previously permitted, with the ability to renew for **up to 36 months** at the carrier's discretion.
- Includes increased consumer protections, specifically requiring insurers to clearly disclose the type of policy the individual is choosing and that these plans do not offer the same coverage as individual plans under the ACA.
- Defers to state regulators on the implementation of the rule:
  - States are permitted to adopt a definition with a **shorter maximum initial duration**, prohibit renewals or extensions of short-term plans, or require additional insurer disclosures.
- STPs **cannot** be used in conjunction with the new individual coverage HRAs, but are eligible for the new excepted benefit HRAs.



# Legal Challenge to STP Final Rule

**Association for Community Affiliated Plans v. United States Department of the Treasury**

A coalition of consumer advocates sued the Trump Administration to have the STP final rule rescinded, arguing that the rule is against Congressional intent of the ACA, and is destabilizing insurance markets with plans marketed as primary coverage.

In May, U.S. District Court Judge Richard Leon heard oral arguments. A ruling is expected in the coming weeks, but is expected to uphold the STP final rule. Regardless of the ruling, it is expected to be appealed.

The House voted **234-183** in May to rescind the STP final rule. However, given the Republican control of the Senate, attempts to rescind any Trump Administration guidance are effectively moot.

# Trump Administration Priorities

## **Selling Insurance Across State Lines**

- RFI issued in March asks how to eliminate barriers for insurers to sell health insurance coverage across state lines. NAHU submitted comments in May noting concerns with uneven state oversight, negligible advantages, and the importance of not preempting or impeding on the role of states as the primary regulators of health insurance.

## **America First Prescription Drug Initiative**

- Prescription drug rebating rule is expected very soon and would eliminate rebates from pharmaceutical companies to PBMs in Medicare Part D and in Medicaid managed care organizations. NAHU submitted comments in April.
- HHS issued final rule in May to require pharmaceutical companies to disclose drug prices in direct-to-consumer advertising. Drugs will now be required to include the list price if it is equal to or greater than \$35 for a month's supply or the usual course of therapy.

# Trump Administration Priorities

## 2020 Payment Parameters

- Modifies the duties and training requirements for navigators, who are now authorized but not required to provide certain types of assistance, including post-enrollment assistance.
- Provides greater flexibility for direct-enrollment entities and additional oversight and transparency. Web brokers will be required to provide the agency with a list of brokers and agents that use their platforms.
- Added several definitions related to web brokers.
- Did not make changes to cost-sharing reductions, re-enrollments, cost-sharing, or mid-year formulary changes.

## Preserving Grandfathered Plans

- RFI issued in February asked for input on the maintenance of grandfathered plans under the ACA. NAHU submitted comments in March on grandfathered and grandmothered plans, ERISA electronic distribution rules, and our support of high risk pools and reinsurance.



# Legislative Advocacy



**NAHU** regularly works directly with policymakers to support or oppose legislation and regulations that impact our industry.

In some situations, bringing less attention to an issue may be the most beneficial to achieving our policy objective.



**Operation Shout!** is **NAHU's** premier grassroots tool for members.

In order to amplify our message and maximize our reach, we utilize Operation Shout for NAHU members to send messages to their legislators asking them to support or oppose certain bills or to alert them of major legislative issues.

With the combined voice of our members we can help to underscore the importance of our message and the extensiveness of our agent and broker community.

# Regulatory Advocacy

NAHU staff develop and submit comments on behalf of membership in response to federal regulations, in consultation with the Legislative Council, Legislative Management Team and Board of Trustees, and guidance through established policy positions

# Coalition Efforts

NAHU belongs to several industry related coalitions that help to amplify our message in Washington and work strategically to achieve the best results for our policy issues.

COALITION AGAINST

**SURPRISE MEDICAL BILLING**



PARTNERSHIP FOR  
EMPLOYER-SPONSORED COVERAGE

HEALTHCARE  
LEADERSHIP  
COUNCIL

**STOP THE**



COUNCIL FOR AFFORDABLE  
HEALTH COVERAGE



CONFIDENTIALITY  
COALITION



PARTNERSHIP FOR AMERICA'S  
HEALTH CARE FUTURE

**MY CARE | MY CHOICE**



EMPLOYERS FOR  
**FLEXIBILITY**

**ALLIANCE  
TO FIGHT** **40**  
THE

Stop the 40% tax on health benefits



# Media

## Media allows NAHU to:

- Project a positive image about our industry
- Generate understanding of role in healthcare
- Educate public about insurance
- Identify NAHU members as credible source of information
- Provide balanced commentary
- Advance legislative agenda

Interview/  
background

Op-Ed

Letter  
to the  
Editor

Press  
Release

Media  
Advisory





*NAHU's legislative efforts are made possible because of our longstanding relationships that we have forged with Senators and members of Congress who support our issues and backed legislation to help agents, brokers, employers, and consumers alike.*

Through its combined contributions of agents and brokers across the country, **HUPAC** is able to support legislators who have a proven record of fighting on our behalf.

**HUPAC** funds allow **NAHU** to have a seat at the table and a voice in the discussion as policymakers consider healthcare reform legislation.



# NAHJU

Join Us!



# Get Informed!

## NAHU

HEALTHCARE HAPPY HOUR  
Official Podcast



Subscribe on  
**iTunes**



Subscribe on  
**Stitcher**



Listen On  
**Spotify**

**NAHU NEWSWIRE**

[Home](#)
[Information](#)
[Resources](#)
[Professional Development](#)
[Events](#)
[Media](#)
[Contact Us](#)

**INDUSTRY HEADLINES**

**Smart benefits: Certain wellness program incentive limits eliminated Jan. 1**

In 2016, the EEOC issued final rules describing how ADA and GINA apply to employer-sponsored wellness programs. The final ADA rule said that incentives to employees who answer disability-related questions or undergo medical exams as part of a program couldn't exceed 50 percent of the total cost of self-only health coverage, while the final GINA rule stated that employers could offer an incentive of up to 30 percent of the total cost of coverage to an employee whose spouse provides information about their health status as part of the employer's wellness program.

[READ MORE](#)

**Annoying robo-calls are at 'epidemic levels' this health open-enrollment season**

With health insurance open-enrollment season underway, automated phone calls offering Affordable Care Act or other health plans are spiking — and driving many consumers to the brink. California residents may have it worst, because its open-enrollment period is twice as long as in other parts of the country. "It's at epidemic levels in the third week of year," said Aaron Foss, founder of Nomorobo, who estimates his spam-call-blocking service, based in Long Island, headed off more than 250,000 health-related robo-calls in October alone — nearly five times the interceptions for September.

[READ MORE](#)

**Commercial, managed care insurance sectors profits boom in Q3**

Health care margins: Commercial and managed care payers experienced significant third quarter profits, reductions in healthcare spending, and enrollment growth, according to the latest financial statements from insurance companies. Medicare Advantage (MA), Medicaid managed care, and commercial group health plans experienced upticks in member enrollment and profitability. A few of the largest commercial payers are also expecting even sharper growth in profitability as they pursue mergers with pharmacy benefit managers (PBMs) to vertically integrate medical and prescription drug insurance businesses.

[READ MORE](#)

**Feds shut down 'sham' health insurance companies**

Industry Alert: Health care has become a big issue for many Americans over the past few years. As the costs of health care continue to rise, families without health insurance are looking for ways to afford those costs. That can make them vulnerable to companies that take their money without providing needed services. The Federal Trade Commission recently reported that a federal judge shut down a Florida-based operation that it accused of misleading more than \$100 million "by preying on Americans in search of health insurance, selling these consumers worthless plans that left tens of thousands of people uninsured."

[READ MORE](#)

**PLU\$ experts: One of the biggest gaps in cyber is explaining it to customers**

Insurance Journal: What's one of the bigger gaps in cyber? Good communication between the insurance industry and customers, who are in need of more than just products to help protect them from risks in the rapidly changing digital world. That was the consensus from a panel of experts speaking recently at the annual PLU\$ conference in downtown San Diego, CA.

[READ MORE](#)

**What the Amazon, Berkshire Hathaway, JPMorgan deal means for payers**

Healthcare Finance: The announcement of the healthcare partnership between Amazon, Berkshire Hathaway and JPMorgan Chase is either the major disrupter everyone in the industry has been awaiting or means little except to the three companies involved. Since the firms have

**WASHINGTON UPDATE**

[Home](#)
[Information](#)
[Resources](#)
[Professional Development](#)
[Events](#)
[Media](#)
[Contact Us](#)

**November 9, 2018**

**FAST FACTS**

- As a result of Tuesday's midterm elections, Democrats will control the House of Representatives and Republicans have expanded their Senate majority for the 116th Congress, beginning in January.
- Several states held ballot measures on healthcare-related issues, including Idaho, Nebraska and Utah, which voters expanded their Medicaid programs.
- Congress will return next Tuesday through mid-December for a lame-duck session. They will need to pass a spending package by December 17 to avoid a government shutdown. NAHU is advocating further delay or permanent repeal of the Cadillac Tax and Health Insurance Tax before the end of the year.
- NAHU CEO Janet Trachtenberg will review the impact of the elections on next Thursday's LME from NAHU's website at 12:30 p.m. Eastern.
- The Healthcare Happy Hour podcast features an extended discussion on the election results as they relate to NAHU's policy priorities for the lame-duck session and the new Congress.

**Midterm Election Results in Split Government and Opportunity to Advance NAHU's Priorities**

The midterm elections on Tuesday resulted in a return to divided government, as Democrats will retain the House of Representatives and Republicans expanded their Senate majority. [Read More](#)

**NAHU Seeks Repeal of Cadillac and Premium Taxes in Lame Duck**

Congress will be returning to Washington, DC, next week for a brief lame-duck session through mid-December. Much of their attention is expected to be focused on... [Read More](#)

**Healthcare Happy Hour: Can Divided Government Achieve Compromise in Healthcare ahead of 2020?**

One of the most heated midterm elections in memory came to a close on Tuesday, and NAHU's Mary W. Buckner, John Greene and Chris Hoffmann analyze the results and what they could mean... [Read More](#)

**State Spotlight: Utah, Idaho and Nebraska Vote in Favor of Medicaid Expansion**

Three traditionally Republican states approved Medicaid expansion in Tuesday's midterm elections, which could extend coverage to an estimated 325,000 low-income people... [Read More](#)

**Trump Administration Seeks Greater Marketplace Verification Standards**

On Wednesday, CMS issued a proposed rule intended to ensure that marketplace consumers are properly enrolled in coverage. The rule would require... [Read More](#)

**Register for Next Week's Webinar on the Election's Impact on Healthcare Issues**

The Democrats have taken back the House and Republicans have expanded their majority in the Senate, ensuring ten years of divided government... [Read More](#)

**Save \$100 on Capitol Conference Registration by Registering Today!**

Early registration is available now through November 28 for NAHU's 29th Annual Capitol Conference. For more than a quarter century, NAHU members have been... [Read More](#)

**Open Enrollment is Underway: Are You Certified?**

The open enrollment period is underway and will last through December 15 for the federal marketplace... [Read More](#)

**HUPAC Roundup: A Congressional Split**


It was a monumental week around the country, with Election Day taking center stage on Tuesday. After an intense battle for Congress over the past several months... [Read More](#)

**What We're Reading**

Although Congressional elections took center stage this week, significant healthcare changes were made as well... [Read More](#)

# Get Engaged!

NAHU activates **Operation Shout** to help members make their voices heard by policymakers.



## Operation Shout!

### Take Action

NAHU is very concerned about ongoing discussions in Congress that would undermine the employer-sponsored health insurance system by eliminating or placing a cap on the **employer tax exclusion** for health insurance. More than 175 million Americans currently receive their coverage through this system, largely due to the tax exclusion where employers provide contributions for an employee's health insurance that are excluded from that employee's compensation for income and payroll tax purposes. Eliminating the exclusion would eliminate the incentive for employers to provide health insurance while capping it would degrade the benefit and serve as a tax increase for middle-class Americans.

The employer-sponsored system is highly efficient at providing American workers and their families with affordable coverage options through group purchasing and its associated economies of scale by spreading risk and avoiding adverse selection. Eliminating the exclusion would eliminate most of the benefits of employer-sponsored insurance, including the means for spreading risk among healthy and unhealthy individuals and group purchasing efficiencies. Capping the exclusion for employees would devalue the benefit and result in a significant tax increase for middle-class Americans, forcing many to drop employer-sponsored insurance, including dependent coverage. Employees would be incentivized to only offer coverage to their employees that would fall below the value of the cap in order to avoid paying any increased taxes, potentially resulting in a race to the bottom for employers to sponsor insurance that wouldn't meet the cap's thresholds and further shifting costs onto employees. Many of the inherent problems with the **employer tax exclusion** would exist for eliminating the employer exclusion such as setting a tax credit sufficiently high enough to cover the significant contribution made by employers today. Also, indexing a credit would need to be set to medical inflation if it is to keep up with the typical rise in healthcare expenses.

The employer exclusion tax benefit makes employer-sponsored health insurance a valuable benefit for workers. We urge Congress to maintain the system that has worked for Americans for decades, and preserve employer-sponsored health insurance through the continuation of the employer exclusion because it preserves the employer system for health insurance for the vast majority of Americans. Over the coming weeks, as Congress discusses various healthcare reform proposals, we want to be sure that they hear directly from agents, brokers and employers about the value of the employer tax exclusion. You can help us spread the message by taking action below:

1. **Contact your senators and representative.** Send an Operation Shout today asking your federal legislators to oppose the elimination or cap of the employer tax exclusion of health insurance in any healthcare reform legislative proposals. You can also call your legislators at the numbers below.
2. **Tell your employer clients to take action.** Your employer clients would be most directly impacted by the elimination or cap of the employer tax exclusion. Tell them to take action sharing why the exclusion must be preserved in any healthcare reform legislative proposals. Tell them to take action **today**.
3. **Share your story.** As a licensed insurance specialist who works closely with employers to help them offer and utilize employer-sponsored health insurance, you know personally about how the employer tax exclusion directly impacts your clients. Stories from your clients will demonstrate the value of the exclusion and the need to preserve it. We will share your stories with appropriate legislators and staff. You can share your story **today**.

Take action today and tell your federal legislators to keep the employer exclusion tax benefit!

### Take Action

Don't want to send an email? No problem, you can also reach your legislators by phone:  
Rep. George Holding (R) can be reached at (202) 225-0032.  
Sen. Richard Burr (R) can be reached at (202) 224-0154.  
Sen. Thom Tillis (R) can be reached at (202) 224-6042.

This call to action is designed as an email message to your legislators. You are welcome to use the prepared text or calling script to call your legislators, or to expand on the prepared message to share your personal story on how

# Contribute!

Few other industries are as heavily regulated as health insurance. Your success, and that of your clients, is directly dependent upon the actions of Congress. It is absolutely critical that we help those Congressional candidates who support private sector health insurance.

**Support legislators who fight for agents and brokers and the employer-based system**





# Resources

As insurance brokers trained in risk management, it is our job to analyze and identify risks that might adversely affect our client's business objectives. Compliance with federal statutes and regulations in the areas of insurance, labor and taxes is a daunting task for many of our employer clients.

**With the NAHU Compliance Corner, you now have a one-stop place to find the majority of federal statutes that affect the employee benefits world.**



## Certifications



## Q and A

**Marcy M. Buckner**

Vice President of Government Affairs  
[mbuckner@nahu.org](mailto:mbuckner@nahu.org)

