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The American Health Care Act Moves Forward: What Employers Need to Know About the House-Passed Bill

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Stage two of repealing and replacing the Affordable Care Act (ACA) is now underway as focus shifts to the Senate, where significant changes are expected to be made to the American Health Care Act (AHCA) as passed by the House. Regardless of what happens next, employers need to know what is in the House-passed version in order to evaluate the potential impact if it becomes law (whether significantly revised or not).

A Brief Recap of the Process So Far

The House of Representatives passed the AHCA on May 4, 2017. The bill as passed includes a number of changes since it was first considered by the House in March. The bill is set up as a "reconciliation bill," which means that it is eligible for expedited process. This is particularly important in the Senate because a reconciliation bill may be passed with only 51 votes (rather than the usual 60 needed to prevent a filibuster from stopping the bill). Although fewer votes are required, additional procedural limitations also apply. These limitations can impact what is included in the final legislation.

The official revenue score for the bill from the Congressional Budget Office (CBO) and Joint Committee on Taxation (JCT) was issued on May 24. This score is needed to confirm whether the House-passed bill meets the budget reconciliation requirements. With the CBO/JCT official score done, the bill is expected to be formally sent over to the Senate soon, where lawmakers have already been discussing key issues. As we await further developments, the House bill deserves a close look.

Repeal or Delay of ACA Taxes and Fees

The AHCA would repeal taxes and fees imposed under the ACA, *other* than the Cadillac Tax, which would be delayed. Taxes of particular concern to employers are shown below.

Tax	Repeal/Delay Effective Date
"Cadillac" Tax (IRC 4980I)	Delayed until 2026
Employer "pay or play" (shared responsibility) penalties (IRC 4980H)	Repealed, retroactive to 1/1/2016
Health FSA salary reduction limit ($2,600 for 2017)	Repealed, effective 1/1/2017
Prescription requirement for OTC drugs	Repealed, effective 1/1/2017
Limit on deductibility of Medicare Part D drug expenses for which subsidy is received	Repealed, effective 1/1/2017
Tax on health insurance premiums	Repealed, effective 1/1/2017
0.9% Medicare tax for higher-income individuals	Repealed, effective 2023
2.8% tax on net investment income for higher-income individuals	Repealed, effective 2017

Note that no changes are made to the way the Cadillac Tax is calculated. Thus, for example, the AHCA would continue to include HSA contributions from employers (including pre-tax salary reduction contributions from employees) in calculating the Cadillac Tax.

Practice pointer: The elimination of the employer "pay or play" penalties would allow employers to revise eligibility language to pre-2015 terms (if desired) – however, any pre-ACA eligibility limitations such as those that arise under 105(h) for self-funded coverage would continue to apply.

Employer Reporting Requirements Simplified, but Not Eliminated

Current-law employer reporting requirements under IRC Sections 6055 and 6056 are used to enforce the employer mandate, the individual mandate, and the ACA premium tax subsidies. Some employer reporting will still be needed under the AHCA to enforce the modified ACA premium tax subsidy, which would be in effect through 2019. However, given the repeal of the employer and individual mandates, much of the detail of current-law reporting (such as the complicated ACA "look-back measurement approach") would not be needed. While the AHCA does not repeal the current-law reporting rules, the IRS hopefully would simplify reporting to eliminate aspects that are no longer relevant.

Starting in 2020, the AHCA calls for streamlined reporting on Form W-2 relating to the new health coverage tax credit (see below).

Health Savings Account (HSA) Improvements

Several significant HSA improvements would go into effect starting in 2018. The HSA contribution limit would be increased to the amount of the maximum permitted out-of-pocket expenses (including deductibles) under a high deductible health plan. Under this provision, the HSA contribution limit for 2018 (not taking into account catch-up contributions) would be $6,650 for self-only coverage and $13,300 for family coverage, compared to $3,450 (self-only) and $6,900 (family) under current law. Other HSA changes would include an increased contribution limit and a retroactive effective date for eligible expenses (up to 60 days after the individual is covered under a high deductible health plan) and easier spousal catch-up contributions.

Repeal of Small Employer Tax Credit

The IRC 45B tax credit for small employers (fewer than 25 full-time equivalent employees) that help employees pay for small business health options program (SHOP) coverage would be repealed starting in 2020. For 2018 and 2019, the credit would not be available for a plan that provides abortion coverage.

Allowing States to Define Essential Health Benefits (EHB)

Starting in 2020, states would have the ability (through a waiver) to define what are considered to be EHBs. While this change is primarily aimed at plans that are required to offer EHBs (i.e., non-grandfathered individual and fully insured small group health plans), it would also impact self-funded plans because the prohibition on annual and lifetime dollar limits applies to EHBs. While this may enable caps or limitations on certain benefits that are determined not to be an EHB, an overall annual or lifetime cap on all benefits would still be prohibited.

Practice pointer: Currently, self-funded plans may use any permissible definition of EHB for purposes of the prohibition on annual and lifetime dollar limits. If states are permitted to define EHB as under the House-passed AHCA, this may provide more flexibility for sponsors of self-funded plans as well.

Employer Reporting Relating to New Refundable Tax Credit for Individual Coverage

Starting in 2020, a new refundable health coverage tax credit would replace the ACA premium subsidy. The new credit would be available for individual coverage on and off Exchanges and would be a specified dollar amount that would increase based on age and phase out based on income. The new credit would not be available to individuals who are eligible for government or employer-sponsored health coverage.

Employers may have two new reporting requirements as part of implementation of the new credit:

- Employers would have to report offers of group health plan coverage to *all* employees (*for each month* coverage is offered) on Form W-2 starting in 2020. Details of the reporting requirement would need to be specified by the IRS, such as whether reporting would apply to retirees for whom a W-2 is not otherwise required and how offers of coverage to dependents is reflected. This new reporting requirement is intended to replace the current offer of coverage reporting under IRC Section 6056. The new W-2 reporting would apply regardless of employer size. (Note that the current requirement that employers report the cost of coverage on Form W-2 would not be changed by the bill.)

- Employers may also have new reporting requirements as part of the advance payment mechanism under the bill. The AHCA as passed by the House directs the Secretaries of Health and Human Services and Treasury to develop rules that provide “robust verification of all information necessary to establish eligibility” for the advance payment. Thus, regulations could impose requirements on employers, such as providing statements to employees regarding offers of coverage upon request if they seek advance payment of the credit.

Modification of Requirements for Fully Insured Small Group and Individual Market Plans

A number of requirements for individual and small group market plans would be relaxed, including elimination of the metal tiers (bronze, silver, gold, platinum) starting in 2020; an increase in permitted age-rating from 3:1 to 5:1, with an option for states to obtain a waiver to allow a greater difference (starting in 2018); and allowing states to define what are considered to be required EHBs (starting in 2020).

Impact on ACA Exchanges and Premium Subsidies

The ACA Exchanges would remain in place, at least for some period of time. The current premium subsidies for coverage purchased on an Exchange would be modified for 2018 and 2019 and would be extended to coverage purchased off the Exchange. Starting in 2020, a new refundable health coverage tax credit would replace the ACA premium subsidies.

Late Enrollment Penalty for Individual Market Coverage Would Replace the Individual Mandate

The individual mandate would be repealed, effective retroactive to January 1, 2016. In its place the AHCA includes other provisions that are designed to encourage individuals to avoid gaps in health coverage or wait until they are sick to obtain coverage. Starting in 2019, individuals enrolling in individual market coverage who have a gap in coverage of at least 63 days during a 12-month period would be charged an additional 30% surcharge on the premium by the insurer. This surcharge would apply for 12 months. This provision would also apply for individuals with a coverage gap who seek to enroll in individual market coverage during a special enrollment period in 2018.

In place of the 30% surcharge, states may obtain a waiver that will allow insurers to charge premiums in the individual market based on the health status of the individual (e.g., based on whether the individual has a pre-existing health condition). Like the 30% surcharge, this individual pricing based on health status would apply to individuals who have a gap in coverage and would apply for 12 months. Insurers could not deny or limit coverage for pre-existing conditions, but could charge individuals more based on a pre-existing condition. A state may only obtain a waiver to allow rating based on health status if the state has a qualifying high-risk program in place.

What’s Next

The official revenue score for the House-passed bill provided by the CBO and JCT guides the process for the AHCA for three key reasons:

- First, the score is needed to confirm whether the House-passed bill meets reconciliation requirements, including the target of at least $2 billion of budget savings so that the bill can move forward in the Senate without going through the usual committee process.

- Second, the score gives the overall budget savings as $119 billion over 10 years. This sets a floor for the amount of budget savings the Senate version must have when the Senate finishes their consideration of the bill. The Senate could make major changes to how these savings are obtained (e.g., by increasing the amount of the new health coverage tax credit paid for by making adjustments to which taxes are repealed and when).
- Third, the CBO and JCT estimate that 23 million more Americans will lose health care coverage by 2026 under the AHCA compared to current law. These coverage estimates are a factor shaping the political and policy debate over the specifics of the bill.

Remember, the AHCA is not yet law and may be changed significantly before final legislation is enacted. Employers should not rely on the AHCA until it becomes law.

All eyes should be on the Senate for the next developments.

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