SEYFARTH SHAW

Health Care Reform Management Alert Series

ACA "Repeal and Replace" Bill Released, Faces Early Congressional Opposition

Issue 106

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This is the one hundred and sixth issue in our series of alerts for employers on selected topics on health care reform. (Click here to access our general Summary of Health Care Reform and other issues in this series.) This series of Health Care Reform Management Alerts is designed to provide an in-depth analysis of certain aspects of health care reform and how it will impact your employer-sponsored plans.

Background: On March 6, Congressional Republicans released the American Health Care Act (AHCA), pitched as the "repeal and replacement" of the Affordable Care Act. (The AHCA is actually currently two parts generated by different committees, but they'll be combined for a vote and we will refer to them as a single bill for purposes of this alert.) This alert is focused primarily on the potential impact of this bill on employers and plan sponsors, although we will also highlight some of the other significant provisions included in the proposal. Notably, while the bill would drive significant changes in the large group market, the AHCA's primary focus and most of its changes impact the individual and small group markets.

Regulatory Outlook:

To be clear, the AHCA still faces significant hurdles before it could become law, including:

- Democrats appear to be uniformly aligned against any efforts to repeal the Affordable Care Act.
- Within hours of the AHCA's release, Republicans faced opposition from one wing of the party with respect to the AHCA's new tax credits, and from another wing of the party with respect to the AHCA's Medicaid expansion phase out.
- Four Senate Republicans have already declared they will not vote for a bill that includes a rollback of the Medicaid expansion (although they subsequently suggested the bill was a step in the right direction).
- The AHCA has also been dubbed "Obamacare Lite" by several conservative interest groups that are influential in Republican circles.
- President Trump's HHS Secretary, Tom Price, has labeled it a "work in progress."
- Congressional Republicans are pushing for a House vote on the bill before the Congressional Budget Office finishes scoring the bill (to determine the impact on cost and coverage). To the extent the CBO estimate becomes available during the voting process, and to the extent the numbers suggest significant coverage losses or increased deficit, that could lead to more defections within the Republican Party.

Process Considerations

While coined a "repeal and replace" bill, the AHCA actually leaves most of the Affordable Care Act in place and builds on/modifies its framework. Due to Senate rules, a complete "repeal" of the Affordable Care Act would require 60 votes, which the Republicans cannot muster (As noted, Democrats in the Senate have generally vowed to fight any efforts to repeal the Affordable Care Act). That said, as discussed in Issue 102, Senate rules would permit modifications to revenue- or budgetary-related provisions through a process called "reconciliation," which only requires 51 votes. As a result, Republicans are limited in what they can address through the AHCA (although President Trump has vowed to address non-reconciliation-eligible provisions, such as permitting the sale of insurance across state lines, through subsequent efforts). It is also important to note that the Senate Parliamentarian has not yet weighed in on whether all of the AHCA's provisions are eligible for inclusion in a reconciliation bill.

What Remains?

As noted above, much of the ACA is ineligible for repeal through reconciliation. As a result, the following provisions will remain in full force and effect, subject to the possibility of future regulatory or legislative action (this list is not comprehensive):

- Prohibition on lifetime and annual dollar limits
- Adult child coverage mandate
- Limit on out-of-pocket maximums
- Insured plan income non-discrimination standard (to the extent the IRS lifts its enforcement moratorium, which seems unlikely before 2020 at the earliest)
- Required coverage for routine costs for clinical trials
- ACA reporting standards**
- Preventive service mandate
- Ban on pre-existing condition exclusions*
- Provider nondiscrimination requirements
- Section 1557 nondiscrimination standards
- Ban on rescissions
- Cadillac tax (eligible for repeal through reconciliation, but retained in the AHCA)**

* Although see Continuous Coverage requirement discussed below

**See detailed discussion below

Next Steps

Congressional mark-ups of the bill begins today, and we can expect various changes to the AHCA before it goes to vote. Early reports suggest Republicans are attempting to push for a quick vote on the bill, which risks criticism of rushing the bill and not permitting for sufficient consideration (similar to the criticism Democrats faced during the Affordable Care Act debate). Republicans are targeting a vote in the House by late March, with a Senate vote to immediately follow no later than April 7th (when Congress goes on a two-week recess).

The following chart aligns how various health care issues are addressed in the existing ACA versus the GOP's currently proposed AHCA.

Issue	ACA	AHCA	Effective Date of Change
Encouraging Healthy Individuals to Purchase Coverage	Individual Mandate	Continuous Coverage Penalty: Individuals with a break in coverage in excess of 63 days must pay a 30% premium surcharge to the insurance carrier to re-enroll in coverage	2019 (individual mandate penalty reduced to $0 beginning in 2016)

Issue	ACA	AHCA	Effective Date of Change
Cost of Coverage	Income-based credits to assist lower-income individuals purchasing health insurance	Age-based credits only: $2,000 < 30 $2,500 between 30 and 40 $3,000 between 40 and 50 $3,500 between 50 and 60 $4,000 > 60 Capped for persons earning in excess of $75,000 ($150,000 for joint filers)	2020
Premium Rating	May not charge more for health status (i.e., pre-existing conditions)	May charge 30% more than standard rate where lapse in coverage	2019
	Older enrollees may not be required to pay more than 3x the rate of younger enrollees	Older enrollees may not be required to pay more than 5x the rate of younger enrollees	2018
Risk Pools	Funding for temporary high risk pools between 2010 and 2014 Marketplaces with shared risk pooling effective 2014, with high cost claims offset by new taxes (such as the Transitional Reinsurance Program fee)	$100B over 10 years into funding state efforts; up to states as to how to apply	2018
Medicaid	State expansion funded by Federal Government	Gradual phase out of expansion; shift Medicaid funding to block grants (i.e., federal contribution is set subject to income inflation), meaning states carry the primary risk	2020
Excise Tax on High Cost Health Plan	40% Cadillac Tax	40% Cadillac Tax	2025 (delayed from existing effective date of 2020)
Employer Mandate	Large employers must offer coverage to full-time employees, or pay a penalty	No penalty for failure to comply with the employer mandate	2016

Issue	ACA	AHCA	Effective Date of Change
Health Savings Accounts	Increases the excise tax on non-medical withdrawals from 10% to 20%	Reduces the excise tax on non-medical withdrawals back to 10%	2018
		Permits deposit of age-based tax credits into an HSA	
		Significantly increases HSA contribution limits to the inflation-adjusted deductible/ out-of-pocket maximum limits for HDHPs	
		Permits reimbursement of expenses incurred pre-HSA establishment, if HSA is established within 60 days of the date qualifying HDHP coverage commences	
		Permit both spouses to make catch-up contributions to an HSA	
Retiree Coverage	Eliminated deduction for employers who receive a Medicare Part D prescription drug subsidy	Reinstates deduction for employers receiving Medicare Part D prescription drug subsidy	2018
Over-the-Counter Drugs	Prohibits tax-free reimbursement for over-the-counter drugs (e.g., through HSAs, FSAs, etc.)	Removes prohibition on reimbursement for tax-free over the counter drugs	2018
Health Flexible Spending Cap	Capped health FSA contributions at $2,500 (adjusted for inflation)	Removes health FSA cap	2018
Additional Medicare Tax for High Wage Earners/Net Investment Income	Imposed an additional 0.9% Medicare HI tax for high wage earners and 3.8% tax on certain passive income	Removes additional Medicare HI tax and tax on passive income	2018

FAQs on the Proposal

Does the AHCA place a cap on the employer tax exclusion for health coverage?

No. An earlier leaked version of the bill included such a cap, but this version eliminated that provision and reinstated the Cadillac Tax (subject to a five year delay to 2025-- seven year delay from the original effective date of 2018).

Does the AHCA eliminate the 1094/1095 employer/plan reporting obligations?

The bill is not entirely clear on the proposed approach to ACA reporting. Given that there remains a tax credit (albeit in a new form) that will be unavailable for persons enrolled in coverage or offered employer coverage, reporting will have to remain, in some form, under the Republican proposal. The bill suggests that reconciliation cannot be used to repeal the reporting standard (or the associated penalty for failure to report). The bill would replace the current reporting standard

with a simplified report (included on the Form W-2), but it appears this new provision wouldn't be effective until 2019. Many unanswered questions remain, including what type of coverage "offer" would render an individual ineligible for a tax credit (e.g., will there be an affordability and/or minimum value standard?).

Does the AHCA eliminate the employer mandate?

Technically, no. It appears Congressional Republicans determined that reconciliation would not permit an elimination of the employer mandate, so they instead reduced the penalty to $0, effective January 1, 2016. That said, if there is no penalty, it appears there is no enforcement "stick" to encourage compliance. Notably, this is a retroactive change, meaning the IRS's enforcement efforts (if any) relating to the employer mandate would likely be limited to failures to offer coverage during the 2015 calendar year.

Does the AHCA address the cost of prescription drugs?

No. Despite President Trump's periodic suggestions that he would force drug companies to reduce their prices, it is not directly addressed in the AHCA. This type of provision would appear to fall outside the scope of changes permitted to be addressed through reconciliation. So, to the extent Congress intends to respond to this concern, they may attempt to address it through a separate bill (although historically Republicans have opposed such efforts).

How will the AHCA compare to the Affordable Care Act from a cost and coverage perspective?

That is unclear as the proposal has not been scored by the CBO (and may not be scored before Congress votes). Some reports suggest that the earlier leaked version of the AHCA received a preliminary CBO score showing significant coverage losses combined with costs in excess of the Affordable Care Act. It appears that some of the changes from the earlier leaked bill (such as reinstituting the Cadillac tax, albeit with an additional delay) may have been intended to drive a better CBO report.

What does the AHCA say about covering abortion services?

This provision does not appear to impact employer-provided coverage. However, an individual cannot buy health insurance coverage that includes abortion services and still qualify for the tax credit.

How does AHCA address the important Issue of tanning salons?

Good news, bronzed beauties! The bill would repeal the Affordable Care Act's 10% excise tax on tanning salons.

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