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PRIORITY Alert

The American Health Care Act

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The fate of efforts to repeal and replace the Affordable Care Act is now in the hands of the Senate lawmakers. The Senate has begun to consider the American Health Care Act (AHCA) recently passed by the House. The AHCA makes several changes impacting employer-sponsored group health plans.

Background

In the wake of the election of President Trump, Congress took immediate action to repeal the Affordable Care Act (ACA). The 115th Congress convened on January 3, 2017, and by January 12, the Senate passed a "budget resolution" directing certain Congressional committees to begin work on drafting a budget reconciliation bill to repeal and replace the ACA. This budget resolution passed the House the next day on January 13.

Reconciliation Process

Congressional Republicans are relying on the "reconciliation process" to pass an ACA repeal and replacement bill, because reconciliation bills only require a simple majority to pass the Senate (i.e., 51 votes rather than the typical 60). However, reconciliation bills are subject to the "Byrd Rule" (named after former Senator Robert C. Byrd), which prohibits reconciliation bills from containing provisions that are "extraneous" to the federal budget, with limited exceptions.

Repeal and Replace Efforts

A number of Senators and Representatives drafted ACA repeal and replace bills. For example: The Patient Freedom Act of 2017 (Senators Susan Collins (R-ME) and Bill Cassidy (R-LA)); and The Obamacare Replacement Act (Senator Rand Paul (R-KY) and Representative Mark Sanford (R-SC)). But, the repeal and replacement bill that gained the most support (and notoriety) was: The American Health Care Act of 2017 (Representative Diane Black (R-TN)).

The AHCA, which was introduced in the House on March 20, 2017, is based in large part on Representative Paul Ryan's (R-Wis.) "A Better Way." Despite the AHCA's support, it faced numerous challenges before narrowly passing the House on May 4, 2017.

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A Brief History of the ACHA

In the same week that the AHCA was introduced, both the House Ways and Means (W&M), and the Energy and Commerce (E&C) Committees held marathon "markup" hearings. The W&M hearing lasted 17 hours, and the E&C hearing lasted 27 hours. Further, President Trump requested that the House hold a vote on the AHCA by the full House only four days (March 24, 2017) after it was introduced. But, Representative Ryan cancelled this vote at the last minute because the AHCA didn't have the necessary support of 216 representatives.

The AHCA failed to garner enough support from the conservative-leaning members of the House Freedom Caucus. And, any attempts to revise the AHCA to attract more members of the Freedom Caucus came at the cost of support by the more-moderate-leaning members of the "Tuesday Group."

After numerous unsuccessful attempts by high-profile Republican politicians, including Vice President Mike Pence, to secure additional support for the AHCA, it appeared that the AHCA would never make it out of the House. But, the MacArthur Amendment (named after Representative Tom MacArthur (R-NJ)) and the Upton Amendment (named after Representative Fred Upton (R-MI)) provided just enough support to move the AHCA through the House and to the Senate. The AHCA narrowly passed the House in vote of 217-213, which was largely on party lines—i.e., all Democrat and 20 Republican representatives voted against the AHCA.

Under the MacArthur Amendment, the states may request a waiver from the following provisions of the AHCA that apply to fully insured policies offered in the individual and small-group markets: (1) the limitation on the age rating ratio of 5-to-1; (2) the requirement to provide benefits in ten categories of essential health benefits; and (3) the prohibition on health status (medical) underwriting for certain individuals for up to one year. The Upton Amendment added an additional $8 billion to protect individuals with pre-existing conditions who reside in states that receive a waiver of the prohibition on medical underwriting.

Summary of the AHCA

Here is a summary of the AHCA's provisions that have the largest impact on employer-sponsored group health plans (both fully insured and self-funded):

Effective in 2016:

- The employer mandate penalty (a/k/a the pay or play penalty) is reduced to $0. (The Byrd Rule likely prohibits an outright repeal of the pay or play penalty.) This change would also enable a large employer to limit health plan coverage to its historical full-time employees, and exclude employees working at least 30 hours per week (but on a less than full-time basis) as required under the ACA.

Effective in 2017:

- Increase in the maximum allowable HSA (health savings account) contributions. Under the AHCA, the limit on HSA contributions is consistent with the maximum statutory out-of-pocket limits imposed on qualified high deductible health plans. For 2017, these limits are: $6,550 for self-only coverage; and $13,100 for family coverage.
- Account-based arrangements such as HSAs, Archer MSAs (medical savings accounts), health FSAs (flexible spending arrangements) and HRAs (health reimbursement arrangements) may again be used to purchase over-the-counter medications, regardless of whether the medication was prescribed.
- The penalty on HSA distributions for certain non-qualified medical expenses is reduced to 10% from 20%.
- The limitation on employee contributions to a health FSA is repealed. (Under the ACA, this limit is currently $2,600 for plan years beginning on or after January 1, 2017, and is annually adjusted for inflation.)

Effective in 2023:

- The additional Medicare tax of .9% on high-wage earners is repealed. This includes an employer's obligation to withhold this additional Medicare tax on employees with earnings in excess of $200,000.

Effective in 2026:

- The excise tax on high-cost employer-sponsored coverage (i.e., the Cadillac tax) takes effect. The Cadillac tax was originally scheduled to take effect on January 1, 2018, but was delayed two years, until January 1, 2020, under the Consolidated Appropriations Act of 2016. The Cadillac tax, which is disliked by many Republicans and Democrats, was likely retained to comply with the Byrd Rule. As a result, it is possible that the Cadillac tax will be further delayed (or repealed) by future legislation.

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There are a number of other AHCA provisions that modify the ACA's provisions. Most notably: the structure change to subsidies available to certain individuals to assist with the purchase of health insurance in the individual market; and the funding of Medicaid. But, those provisions have little, if any, direct effect on employer-sponsored group health plans.

Next Steps

The AHCA next moves to the Senate, where it will almost certainly be further revised. However, it is unlikely that the Senate takes any significant actions with respect to the AHCA until the Congressional Budget Office (CBO) releases its updated "score" of the AHCA. The score is an estimate of the potential costs and likely effect of legislation. The CBO announced that this updated score would not be released until the week of May 22, 2017.

The provisions explained above appear to have the support of most Congressional Republicans (and possibly, some Democrats). So, regardless of what changes are made to the AHCA by the Senate, it is likely that these provisions will largely be unchanged.

Conclusion

The AHCA still faces an uncertain future for various reasons. For example, it is unclear whether changes made by the MacArthur Amendment comply with the Byrd Rule. Also, identical versions of the AHCA must be passed by both the House and Senate before it is sent to the President for signature. This means any Senate changes must again be approved by the full House.

We will continue to publish health care reform newsletters as significant developments with respect to the AHCA emerge.

However, if you have any questions, please contact the author or another member of the Health Care Reform Team.

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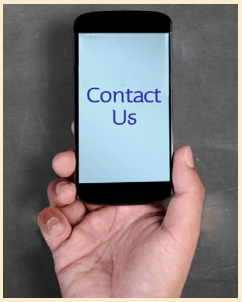

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