

March 17, 2017

## WILL THE AFFORDABLE CARE ACT BE TRUMPED?

The American Health Care Act (AHCA) was unveiled this month by Republican members of the House. Early on this year it looked like the ACA repeal and replace train was going nowhere fast following President Trump's executive order on the ACA. Repeal and replace has suddenly lurched forward and is on an accelerated pace with the recent release of the AHCA provisions. While the Trump administration has finally put a health reform stake in the ground by proposing legislative repeal/replacement provisions, there will be much discussion, amendment, revision, etc. before any final product emerges.

### TRUMP TRAIN MOVES FORWARD IN MARCH

Here is a brief timeline of events for those of you not keeping close score:

- March 6, 2017 – House committees release two proposed legislative pieces, collectively known as The American Health Care Act
- March 8, 2017 – Both House committees begin mark-up of their respective pieces of the AHCA
- March 9, 2017 – Both House committees vote on and approve their portions of the AHCA; votes are cast along party lines
- March 13, 2017 – Congressional Budget Office releases cost estimate report on AHCA: deficit will be reduced but fewer people will have health coverage over next 10 years
- March 16, 2017 – House Budget Committee merged both pieces into one bill and votes to approve the AHCA by a vote of 19 to 17 with 3 republican members crossing over and voting against
- The House Rules Committee is next to review and some amendments are expected. If approved, the AHCA will be sent to the full House for consideration; possibly by next week
- Last stop will be the full Senate, unless the Senate passes its own version of repeal/replace, which is not expected at this time

### IN THIS ALERT

- Lurching forward in March on the Trump train – it's already been a hectic month and it's only half over
- The current Republican game plan calls for a three phase approach to tackle the ACA, and the AHCA is only phase 1
- Here is a quick review of the significant ACHA provisions that apply to employers and their group health plans
- Mutiny on the Bounty -- Some Republicans are among the AHCA's biggest detractors

## THE CURRENT REPUBLICAN GAME PLAN

According to House Speaker Paul Ryan, repealing and replacing the ACA will occur in three phases, identified as follows:

- RECONCILIATION – The American Health Care Act
  - The reconciliation process will be used to enact the AHCA to unwind and change tax and spending related portions of the ACA which requires only a majority of votes in each House of Congress
- ADMINISTRATIVE ACTION – by HHS Secretary Tom Price
  - Action will be taken through regulatory channels to reduce regulatory burden on employers and individuals, provide increased flexibility and ensure a stable transition to a post-ACA world
- ADDITIONAL LEGISLATION – In addition to and outside of the reconciliation process
  - The Trump Administration will work with Congress to advance legislation for non-tax related reforms of the health care system. Examples offered include allowing health insurance to be purchased across state lines, the formation of association health plans for small businesses and medical malpractice reform
  - These measures will require collaboration with Democrats and involves the potential for a Democrat filibuster in the Senate because 60 votes are required (Republicans have only a 52 to 48 vote majority).

## THE AMERICAN HEALTH CARE ACT

The House Ways and Means Committee and the House Energy and Commerce Committee repeal/replace proposals have now been merged as one bill by the House Budget Committee -- known as the American Health Care Act (AHCA). The reconciliation process will be used to gain passage of the AHCA.

Not all provisions of the ACA concern employers and their employer-sponsored group health plans. Likewise, not all provisions of the proposed AHCA relate to employers and their group health plans. Here is a quick list of AHCA provisions that, if passed and signed into law, would directly affect employers:

- The \$2,000 A-Tax penalty and the \$3,000 B-Tax penalty would be reduced to zero dollars, retroactively for months after December 2015
  - Perhaps of no practical import since this is an assessable excise tax and the IRS has not yet assessed any tax against any employer for 2015
- Employer 1095-C reporting continues through tax year 2019 (Yes, you read that correctly)
  - To be phased out but apparently continues to assist the IRS with the administration/enforcement of the current ACA premium tax credit system

- This reporting may be administratively suspended by IRS as redundant when new W-2 reporting requirement takes effect (see below)
- Creates new W-2 reporting requirement: employers must report on employee W-2s whether the employee had an offer of eligible employer-sponsored coverage
- Delays the Cadillac Plan tax – does not repeal it – for years 2020 through 2024. The Cadillac plan tax was already delayed until 2020 under the ACA. It is now eliminated from 2020 through 2024 by the AHCA and then reinstated for tax periods beginning in 2025
  - For those scratching their heads, this is the price for not capping the employer-provided health care exclusion from income
- Repeals the restrictions on reimbursement of over-the-counter drugs beginning tax year 2017
- Repeals the \$2500 limitation on employee contributions to health FSAs beginning tax year 2017
- Repeals the Essential Health Benefits (EHB) requirement as of 2020
  - Technically a small group requirement
- Increases the HSA annual contribution limits to match the out-of-pocket limits for HSA-qualified HDHPs for self-only and family coverage beginning in tax year 2018
- Allows both spouses to make catch-up contributions to the same HSA beginning in tax year 2018
- Repeals the small business health Insurance tax credit beginning tax year 2020

The AHCA repeals other provisions that indirectly affect employer group health plans because they are passed on by way of higher health plan costs. Some examples of these include repeal of the health insurance tax, the branded Rx drug tax and the medical device tax.

Finally, there are several provisions that remain and are not changed as part of phase 1 of repeal/replace. These include no pre-existing condition limitations, coverage for children up to age 26, no annual and lifetime limits, caps on out-of-pocket spending, prohibitions on rescissions, no waiting periods longer than 90 days and required first-dollar preventive care coverage.

### REPUBLICAN DISSENT – CAN WE ALL PLEASE JUST GET ALONG?

It's been a raucous week on Capitol Hill. As expected, the AHCA was met with strong opposition from Democrats. However, the opposition hasn't stopped there. Many hospital and physician groups have weighed in with unfavorable reviews of the AHCA. There has also been significant criticism from some conservative Republicans who oppose the use of refundable tax



credits beginning in 2020 and some moderate GOP senators who don't want expanded Medicaid coverage in their states disrupted.

Senator Rand Paul has been particularly critical of the AHCA, calling it "Obamacare Lite" because it does not fully repeal all ACA provisions and leaves the federal government with significant control of the nation's health care industry. Senator Paul has introduced his own legislation that repeals the ACA in its entirety and proposes several replacement provisions.

House Speaker Paul Ryan asserts that the AHCA is the best, and perhaps only, chance to partially repeal/replace the ACA under the current political climate and describes the bill as compromise legislation. Compromise or not, it is quite possible that the Senate presently lacks the 51 votes necessary to pass the AHCA in its current form.

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**About The Author.** This Alert was prepared for **AMR Benefits Management, LLC** by Richard A. Szczebak. Mr. Szczebak is an accomplished attorney and consultant with a strong background in regulatory and compliance matters regarding employee benefit plans, federal health care reform (ACA) and Massachusetts health care reform. His firm, Parker Brown Macaulay & Sheerin PC, concentrates exclusively in employee benefits law. Its senior level counsel navigate the complicated rules that govern employee benefit plans. Mr. Szczebak can be reached at [rszczebak@parkerbrown.com](mailto:rszczebak@parkerbrown.com).

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