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Repeal and Replace — What Health Reform Law Changes Might Be in Store for Employer-Sponsored Group Health Plans Under the Trump Administration

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President-elect Donald Trump and the Republican Party, which retained its House and Senate majorities during the November 8th election, have made no secret of their desire to "repeal and replace" the Patient Protection and Affordable Care Act (the "ACA"). The ACA, passed in 2010 by a then-Democratic controlled Congress and signed into law by President Barack Obama, made sweeping changes to the Federal laws governing health care plans and policies, including employer-sponsored group health plans which cover tens of millions of Americans. While a complete repeal of the ACA is highly unlikely given the current filibuster rules in the Senate, employers and other sponsors of group health plans (*e.g.*, the board of trustees of a multiemployer health plan) can expect to see at least some changes in 2017 to the laws with which those plans must comply[1].

The Filibuster – An Obstacle to Complete ACA Repeal and Replacement

Although the Republican Party will control the Presidency and maintain both of its Congressional majorities in 2017, repealing certain provisions of the ACA as well as passing replacement provisions would require 60 votes to overcome the filibuster in the Senate. If the Republican candidate wins the December 10th runoff contest in Louisiana, the Republican Party will control 52 Senate seats, short of a filibuster-proof majority (assuming the Senate votes entirely along party lines). Only certain legislation relating to spending, revenues, and expenses can be passed in the Senate with a simple 51-vote majority, a process referred to as "reconciliation."

ACA Provisions That Could Be Repealed with Reconciliation

An example of some of the ACA provisions that likely can be repealed through reconciliation is the Restoring Americans' Healthcare Freedom Reconciliation Act of 2015 (the "RAHFRA"), which completed the reconciliation process in the House and Senate in January 2016 but was vetoed by President Obama. RAHFRA sought to repeal, among others, the following ACA provisions applicable to group health plans and their sponsoring employers:

- ***Employer Mandate.*** Internal Revenue Code ("Code") Section 4980H (often referred to as the "employer mandate") assesses taxes on certain large employers that: (1) fail to offer at least 95% (increased from 70% in 2015) of their full-time employees the ability to elect health plan coverage for themselves and their dependents (Code Section 4980H(a)); or (2) offer such coverage, but that coverage is not "affordable" to the full-time employee (Code Section 4980H(b))[2]. Those penalties are determined on a month-by-month basis, but are assessed annually. The Code Section 4980H(a) penalty applies for each month the employer does not meet the 95% threshold (*i.e.*, one-twelfth of the annual penalty is assessed for each applicable month), so long as at least one full-time employee obtained a Code Section 36B subsidy to purchase health insurance coverage on a public health exchange. The Code Section 4980H(b) penalty applies if the offer of coverage to a full-time employee is either not affordable or fails to provide minimum value, that employ-ee declines the coverage, and he obtained a Code Section 36B subsidy to purchase health insurance coverage on a public health exchange. For 2016, the annualized Code Section 4980H(a) penalty is $2,160 times the number of full-time employees (less thirty). The annualized 2016 Code Section 4980H(b) penalty is $3,240 and applies only to those full-time employees who actually purchase public health exchange coverage with a Code Section 36B subsidy[3]. (For more information on the employer mandate, see Trucker Huss' 2014 article written by Tiffany Santos and Elizabeth Loh.)

- ***Cadillac Tax.*** Effective starting in 2020, the Cadillac Tax is a 40%, deductible excise tax that applies annually to certain group health coverage that, in the aggregate (*e.g.*, major medical coverage offered with a health FSA), exceeds $10,200 for individual coverage, and $27,500 for family coverage (Code Section 4980I). The $10,200 and $27,500 thresholds are subject to indexing annually and before their effective dates for inflation and other factors (*e.g.*, age and gender).

- ***Prohibition on Certain Tax-Free Reimbursements of OTC Medications.*** Under Code Section 106(f), health flexible spending accounts ("FSAs"), health reimbursement arrangements ("HRAs"), health savings accounts ("HSAs"), and Archer medical savings accounts cannot make tax-free reimbursements of over-the-counter medications unless the medication is prescribed or is insulin.

- ***Health FSA Salary Reduction Limit.*** Code Section 125(i) places an annual cap on health FSA salary reduction contributions by employees ($2,600 in 2017).

ACA Provisions That Likely Cannot Be Repealed with Reconciliation

Examples of ACA provisions affecting group health plans that likely require overcoming the filibuster to repeal include:

- The prohibition of pre-existing condition exclusions (described in a Trucker Huss article available here);

- The requirement to offer coverage to dependent children up to age 26 (described in a Trucker Huss article available here);

- Limits on maximum out-of-pocket expenses for in-network benefits (described in a Trucker Huss article available here);

- The prohibition of "excessive" eligibility waiting periods (described in a Trucker Huss article available here);
- The requirement to cover in-network preventive health services with no cost-sharing (described in a Trucker Huss article available here);
- The prohibition of annual and lifetime dollar limits on "essential health benefits" (described in a Trucker Huss article available here);
- The enhanced claims procedures and external review requirements (described in a Trucker Huss article available here); and
- The prohibition on rescissions (described in a Trucker Huss article available here).

Health Reform Law Changes Advocated by the President-elect and Republican Congress

President-elect Trump. Although he has not provided a detailed ACA replacement plan, below are examples of health law changes (or retentions of existing ACA provisions) affecting employer-sponsored group health plans proposed by President-elect Trump:

- Largely repeal the ACA but retain the prohibition of pre-existing condition exclusions;
- Expand HSA access (unclear whether this would include removing the high deductible health plan requirement, which is explained in a Trucker Huss article available here); and
- Allow the sale of health insurance across state lines.

House Speaker Paul Ryan. One of the most comprehensive ACA repeal-and-replacement proposals supported by the Republican Party was designed by House Speaker Paul Ryan (available here). That proposal includes, among others, the following major changes to laws affecting employer-sponsored group health plans:

- Repeal the ACA taxes relating to employer-provided group health plans and their sponsors, including the Cadillac Tax and employer mandate (along with the complex reporting requirements associated with the employer mandate, which are explained in a Trucker Huss article available here);
- Repeal most of the health reform mandates under the ACA, such as the blanket prohibition on imposing pre-existing condition exclusions (while retaining the pre-ACA HIPAA rules for creditable coverage), the limits on health plan waiting periods, and the lifetime dollar limits on "essential health benefits" (the requirement to cover dependent children up to age 26 would be retained);
- Place a cap on the tax-exclusion amount for contributions to and benefits under employer-sponsored group health plans (employee HSA contributions would be exempted from this cap);
- Expand HSA availability, including changing the contribution limit to the maximum combined and allowed annual deductible and out-of-pocket limits;

- Allow employers to adopt "standalone" *(i.e.*, not coupled with major medical coverage) HRAs and employer payment plans, which currently violate the ACA if offered to more than one active employee (see Trucker Huss' 2016 article for more information on this prohibition); and
- For wellness programs, permit the unlimited financial incentives and the voluntary collection of medical information from an employee's family member[3].

Effecting ACA Changes Through the Executive Agencies Rather than Congress

By appointing Secretaries of the Internal Revenue Service (Steve Mnuchin proposed), Department of Labor (Andrew Puzder proposed) and the Department of Health and Human Services ("HHS") (Representative Tom Price proposed), three agencies responsible for enforcing and issuing regulations on ACA provisions, the Trump Administration may also be able to effect some (albeit less substantial) ACA changes outside of the legislative process (*i.e.*, without Congress passing laws with such changes). For example, HHS could, within the constraints of the current statute, redefine which services and drugs are considered "preventive" for purposes of the coverage mandate described above (*e.g.*, possibly to exclude emergency contraceptives such as Plan B). In another example, the new head of the Equal Employment Opportunity Commission could withdraw its ADA and GINA wellness regulations affecting group health plans described above.

Conclusion

Although ultimately it is unclear what ACA specific changes affecting employer-sponsored group health plans are in store in 2017 and future years under a Republican-controlled Presidency and Congress, the availability of the reconciliation process and upcoming appointments of new agency heads likely means that at least some significant changes are forthcoming. Employers should pay close attention to news on Executive and Congressional action in the next year so that they can prepare for and comply with any such changes.

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1 This article does not discuss the portions of the ACA affecting non-employer insurance markets (*e.g.*, Medicare, Medicaid, and the individual market) except to the extent they relate to employer-sponsored group health plans.

2 Both the Code Section 4980H(a) and 4980H(b) penalties are triggered only if a full-time employee of the large employer purchases health exchange coverage using subsidy provided under Code Section 36B.

3 Technically, RAHFRA would have replaced the current penalties under Code Sections 4980H(a) and 4980H(b) with "$0" because the Senate parliamentarian essentially ruled that an outright repeal of the employer mandate was outside the scope of the reconciliation process (albeit reducing the penalty amounts to $0 effectively eliminates the employer mandate).

4 See Trucker Huss' 2016 article for an explanation of the Americans with Disabilities Act ("ADA") rules for financial wellness incentives and the current Genetic Information Nondiscrimination Act ("GINA") prohibition of collecting a family member's medical information.