

Examining the House ACA-Repeal Bill's Potential Impact on Employers and Other Sponsors of Group Health Plans

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On Monday, March 6, the House Ways and Means Committee and Energy and Commerce Committee each released formal proposals partially repealing and replacing the Patient Protection and Affordable Care Act (the "ACA"). Signed into law in 2010 by then-President Barack Obama, the ACA significantly changed the federal laws governing health care and insurance, including employer-sponsored group health plans ("GHPs"), Medicaid, and the individual insurance market. Collectively titled the American Health Care Act ("AHCA"), the two House Committee proposals use the "reconciliation" process to unwind, revise, or delay tax- and spending-related aspects of the ACA.¹ The AHCA borrows heavily from prior Republican repeal-and-replacement proposals, including House Speaker Paul Ryan's "A Better Way" plan and Health and Human Service Secretary Tom Price's Empowering Patients First Act of 2015.

Potential AHCA Impact on Employers and Other GHP-Sponsors

The bulk of the AHCA focuses on repealing and replacing a number of ACA provisions that do not affect (or have only an incidental effect on) GHPs and employer- and union-sponsors of GHPs, such as the pricing requirements in the individual insurance markets and federal funding for state Medicaid programs. The AHCA, however, also would repeal, delay, or revise several ACA and non-ACA provisions directly related to the taxes, fees and related compliance costs borne by GHP-sponsors in relation to the GHP coverage they offer employees. This special alert focuses on the impact of those GHP-related provisions, which are described in more detail in the following sections and include:

- Repealing of the employer mandate penalty;
- Delaying the effective date of the Cadillac Tax for five years;
- Eliminating the health flexible spending account ("FSA") employee contribution limits;
- Expanding health savings account ("HSA") availability;

- Repealing the prohibition of tax-free reimbursements of over-the-counter (“OTC”) medications by HSAs and other account-based plans;
- Removing the limit on employer deductions relating to certain retiree prescription drug plans; and
- Adding a new refundable, advance tax credit that could be used to pay for certain individual insurance and unsubsidized GHP COBRA coverage, which would replace the current ACA tax credits.

Reduction of Employer Mandate Penalty to \$0 (Retroactive to 2016)

- **Affected Rules.** The employer mandate, a provision in the Internal Revenue Code (“Code”), assesses taxes on certain large employers who fail to meet either of the following requirements during a particular month:
 - Offer “minimum essential” health coverage to 95% of full-time employees.²
 - Meet the 95% requirement, but the coverage offered is not “affordable” and “minimum value.”³

Notably, the AHCA would leave intact the related employer-reporting requirements under Code Sections 6055 and 6056, likely because repealing those provisions would not be expected to affect spending and revenues and would, therefore, be outside the scope of reconciliation. It remains to be seen whether the Internal Revenue Service (“IRS”) would provide regulatory or sub-regulatory relief from some or all of those requirements in the event of the employer mandate penalty’s repeal. Even if such relief were provided, however, employers would be subject to at least some (albeit less burdensome) GHP-reporting obligations under the AHCA. The AHCA would add a new requirement for employers to report, on their employees’ Forms W-2, each month in which those employees were eligible for GHP coverage (indicating that such an employee is ineligible for the new tax credit that would be added by the AHCA). Moreover, the AHCA tax credits are not proposed to replace the current ACA tax credits until 2020, so at least some employer reporting would continue to be required for the IRS to administer the ACA tax credits until they are phased out completely.

- **Effective Date.** The AHCA’s elimination of the employer mandate penalty would be retroactive to the beginning of 2016.
- **GHP/Sponsor Impact.** Because of the retroactive penalty repeal, employers that failed to meet one or both of the employer mandate requirements in 2016 would not be assessed a tax penalty. In addition, the lack of an employer mandate penalty going forward provides large employers with the opportunity to redesign their GHP eligibility structures. Subject to other legal obligations (e.g., collective bargaining agreements), such employers would therefore have the opportunity to scale back employee eligibility — or simply decouple employee eligibility with the complex measurement rules required to avoid potential employer mandate penalties.
- **For More Information.** For an explanation of the Employer Mandate rules, see Trucker

Huss' 2014 article available [here](#). An explanation of the related reporting rules can be found in a Trucker Huss article available [here](#).

Delay of the Cadillac Tax Until 2025

- **Affected Rules.** The Cadillac Tax is a 40%, deductible excise tax that would take effect in 2020 and apply 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. The \$10,200 and \$27,500 thresholds are subject to indexing annually and before their effective dates for inflation and other factors, such as age and gender.
- **Effective Date.** The AHCA effectively would delay the Cadillac Tax until the start of 2025 (i.e., for five years). We suspect the AHCA does not propose an outright repeal of the Cadillac Tax because doing so risks violating the Senate's reconciliation requirements (once the bill reaches the Senate); namely, the Byrd Rule prohibits including a provision that would increase the deficit for a fiscal year beyond the 10-year "budget window" covered by the reconciliation measure. A prior draft of the repeal bill leaked in early February included a cap on the current tax-exclusion amount for GHP contributions. The tax-exclusion cap, however, was not included in the AHCA and, therefore, was not available to offset any deficit increases after the 10-year budget window that would be caused by a complete repeal of the Cadillac Tax.
- **GHP/Sponsor Impact.** Many employers' GHP offerings (e.g., major medical plus a health FSA) were on track to exceed the Cadillac Tax's limits. And because the Cadillac Tax is indexed at a rate lower than medical inflation, many employers had already begun planning how to scale back their GHP offerings in anticipation that those GHP offerings, if left unchanged, eventually would become subject to the Cadillac Tax. If the AHCA's Cadillac Tax delay becomes law, however, such employers and other GHP-sponsors can breathe easier, possibly postponing any plans to reduce their GHP offerings. The AHCA would mark the second time the Cadillac Tax is delayed (its original effective date was 2018), creating further uncertainty as to whether the tax will ever take effect.

Repeal of Health FSA Employee-Contribution Limits

- **Affected Rules.** Health FSAs are one type of account-based health plan to which employees and their employers can make pre-tax contributions, allowing such employees to receive pre-tax reimbursements of certain eligible medical expenses (e.g., co-payments). The ACA placed an annual cap on FSA salary reduction contributions by employees (\$2,600 in 2017).
- **Effective Date.** January 1, 2018.
- **GHP/Sponsor Impact.** The AHCA's repeal of the health FSA salary-reduction limit would allow employers to increase the permitted level of employee contributions to those health FSAs. Such contributions are exempt from federal income and employment taxes, including the portions of Social Security and Medicare taxes that would be payable by the employer if the contributions were paid instead as taxable wages to the employee.

Expansion of HSAs

- **Affected Rules.** HSAs are a non-GHP, account-based vehicle whereby employees and employers can make pre-tax contributions to be used to reimburse the employee, tax-free, for certain eligible medical expenses. The AHCA would make the following changes to rules governing HSA contributions and reimbursements:
 - Increase the annual, pre-tax HSA contribution limit to equal the out-of-pocket maximum limits under Code-qualifying “high deductible health plans” (“HDHPs”) which are \$6,550 for self-only coverage and \$13,100 other-than-self-only coverage in 2017. The current annual contribution limits are \$3,400 for self-only coverage and \$6,750 other-than-self-only coverage, nearly half of what those limits would be under the AHCA.
 - Where both spouses are HSA-eligible, each could make a “catch-up” contribution (an additional \$1,000 contribution for individuals who are over age 55) to the same HSA, rather than to separate HSAs (as required under the current HSA rules).
 - Reduce the tax on impermissible HSA reimbursements from 20% to 10% (eliminating the 10% increase added by the ACA).
 - If an HSA is established within 60 days after the employee’s enrollment in a HDHP, the HSA could reimburse expenses incurred within those first 60 days (*i.e.*, before the HSA was established).
- **Effective Date.** January 1, 2018.
- **Sponsor Impact.** The AHCA changes essentially increase both the opportunity and incentive for employees and employers to make pre-tax HSA contributions — or for employers to adopt HSA-compatible HDHPs. As with health FSA contributions, such HSA contributions reduce the Social Security and Medicare taxes owed by the employer.
- **For More Information.** An explanation of the rules for pre-tax HSA contributions and distributions can be found in a Trucker Huss article available [here](#).

Repeal of Prohibition on Pre-Tax Reimbursements of Certain Over-the-Counter (“OTC”) Medications

- **Affected Rules.** Under ACA, health FSAs, health reimbursement arrangements (“HRAs”), HSAs, and Archer medical savings accounts cannot make tax-free reimbursements of OTC medications unless the medication is prescribed or is insulin. The AHCA repeals this provision.
- **Effective Date.** January 1, 2018.
- **GHP/Sponsor Impact.** As with the other changes to account-based health plans by the AHCA, the repeal of the ACA’s prohibition on tax-free OTC reimbursements increases the scope of potential tax savings for — and presumably, the incentive for employees to participate in — such plans by making contributions exempt from Social Security and Medicare taxes that would otherwise be paid by their employers.

Repeal of Tax Deduction Limits for GHP Expenses Attributable to Medicare Part D Subsidy

- **Affected Rules.** The ACA added a rule requiring employers that receive the retiree drug subsidy (“RDS”) for providing prescription drug coverage to Medicare beneficiaries under a retiree GHP to take into account those RDS payments for purposes of determining any applicable tax deductions. This ACA provision effectively reduced the amount such employers were able to deduct in taxes relating to RDS-eligible GHPs.
- **Effective Date.** The AHCA would repeal the ACA’s deduction limitation effective January 1, 2018.
- **GHP/Sponsor Impact.** The AHCA would allow employers that sponsor (or plan on sponsoring) retiree GHPs which receive the RDS to take advantage of a potentially larger tax deduction.

Advance, Refundable Tax Credit Toward the Cost of Individual Insurance and Unsubsidized COBRA Coverage That Do Not Cover Abortions

- **Affected Rules.** The ACA currently provides a refundable tax credit (payable in advance) to certain low-income individuals for the purchase of coverage on the public health insurance exchanges. Employees who enroll in GHP coverage, including COBRA continuation coverage (e.g., upon termination of employment), are not eligible for the ACA’s tax credit. The AHCA would phase-out the current tax-credit structure and replace it with an age-based, refundable credit (also payable in advance) that could be used to pay for individual insurance (including non-exchange) coverage as well as “unsubsidized” COBRA coverage (i.e., not paid by the employer) — as long as the coverage does not cover abortions other than in cases of rape, incest, or when necessary to save the life of the mother.⁴ The AHCA’s tax credits, ranging from \$2,000 to \$4,000 for an individual, would include different income limitations from those of the current ACA credits — phasing out in increments for individuals and joint filers with modified adjusted gross incomes greater than \$75,000 and \$150,000, respectively.
- **Effective Date.** The AHCA would replace the current ACA tax credits beginning in 2020, and would make the current ACA tax credits available for non-exchange coverage beginning in 2018.
- **GHP/Sponsor Impact.** Employers who want COBRA participants (e.g., terminated employees) to be able to use the AHCA’s tax credits for their GHP COBRA coverage would need to ensure that those GHPs do not cover abortions other than as permitted by the AHCA.

Other ACA Provisions Affecting GHPs and Sponsors Which Are Left Intact by the AHCA

Likely because the reconciliation process’ requirement that any changes must affect spending or revenues, the AHCA does **not** repeal the ACA’s coverage and benefit mandates relating to GHPs, such as:

- The ACA's prohibition of annual and lifetime dollar limits on "essential health benefits" (see the Trucker Huss article available [here](#));
- The prohibition of pre-existing condition exclusions in GHPs and other health plans (also addressed in the [Trucker Huss article](#) on annual and lifetime limits);
- The prohibition of certain GHP eligibility waiting periods deemed "excessive" (see the Trucker Huss article available [here](#));
- The requirement for GHPs to cover in-network, preventive health services at no cost to the participant (see the Trucker Huss article available [here](#));
- The requirement for GHPs to offer coverage to dependent children up to age 26 (see the Trucker Huss article available [here](#));
- Limits on maximum out-of-pocket expenses for in-network GHP benefits (see the Trucker Huss article available [here](#));
- The enhanced claims procedures and external review requirements for GHPs (see the Trucker Huss article available [here](#)); and
- The prohibition on most retroactive coverage terminations, referred to as "rescissions" (also addressed in the [Trucker Huss article](#) on annual and lifetime limits and pre-existing condition exclusions).

Much-Discussed Provisions that Are Not Applicable to Large GHPs or Large GHP-Sponsors

There has been a lot of news coverage on the AHCA's proposals regarding "continuous coverage" (if there is at least a 63-day break in coverage, premiums can increase 30% for a 12-month period); and the ability for insurance carriers to charge older individuals at rates that are five times higher than the rates charged to younger people (the ACA currently limits the pricing ratio 3:1). Those provisions apply only to the individual insurance market and the small employer insurance market; they do not apply to large GHPs.

Next Steps

Both House Committees began markup of the AHCA bills on Wednesday, March 8, and the Ways and Means Committee passed its portion of the AHCA without any amendments early Thursday, March 9 (after nearly 18 hours of debate). If passed by both Committees, the bills comprising the AHCA will be combined by the House Budget Committee, reviewed by the House Rules Committee, and then sent to the full House for a vote. Using its own procedures the Senate may choose to pass its own ACA repeal-and-replacement bill, after which both Chambers will go through a process of combining the House and Senate versions. Alternatively, and as expected to be the case, the Senate could choose to vote immediately on the version of the AHCA passed by the House. However, considerable opposition to the AHCA and prior, similar repeal-and-replacement proposals — by both conservative and liberal politicians, advocacy groups, and other prominent figures — has cast doubt on whether the Senate can muster the 51 votes necessary to pass the AHCA (or a substantively similar bill) using the reconciliation process.

In any event, the AHCA likely will undergo at least some substantive changes before it reaches the full House for a vote — and then, eventually, the Senate. Trucker Huss will continue to provide updates on the AHCA to employers and other GHP-sponsors who would be affected by its enactment.

¹ Passing and repealing legislation requires majority approval in the House and generally 60 votes (rather than a simple majority) in the Senate; Republicans currently control 52 Senate seats, and no Democratic Senators are expected to support ACA-repeal legislation. Under the reconciliation process, however, certain legislation relating to outlays (*i.e.*, spending) and revenues can be passed in the Senate with a simple 51-vote majority. In addition, under the Senate's Byrd Rule, certain other provisions are considered outside the scope of reconciliation (*e.g.*, a provision that would increase the deficit for a fiscal year beyond the 10-year "budget window" covered by the reconciliation measure). More information on the reconciliation process can be found in my [January 2017 article in Law360](#) (subscription required).

² For 2016, the annualized penalty (*i.e.*, the penalty when the employer fails to meet the 95% requirement during all 12 months of the year) essentially is \$2,160 multiplied by the number of full-time employees of the employer (less 30), as long as at least one full-time employee obtained a subsidy to purchase health insurance coverage on a public health exchange (*e.g.*, the Covered California exchange).

³ The annualized 2016 penalty for failing to meet this requirement is \$3,240 and essentially applies only to those full-time employees who actually purchase subsidized public health exchange coverage.

⁴ The AHCA would not prohibit the employee from purchasing separate coverage, with other funds, that covers non-exempt abortions.

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