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ACA Update: Major Changes for Employers Still Possible This Year — An In-Depth Look at What's at Stake

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On Friday, March 24th, Speaker Paul Ryan cancelled a House of Representatives vote scheduled for that day on the American Health Care Act (AHCA), a bill that proposed to repeal, replace and revise various tax- and spending-related aspects of the Patient Protection and Affordable Care Act (ACA). As explained in our special alert released earlier this month, a number of AHCA provisions would have impacted employers and group health plans (GHPs) significantly — the source of coverage for an estimated 55% (roughly 177 million) of all Americans. Those AHCA provisions included: (1) eliminating the employer mandate penalty retroactive to 2016; (2) delaying the Cadillac Tax until 2026 (2025 in the AHCA draft); (3) loosening the tax restrictions on health flexible spending accounts (FSAs), health savings accounts (HSAs) and other account-based GHPs retroactive to the beginning of 2017 (2018 in the initial AHCA draft); and (4) removing an ACA-imposed limit on employer deductions relating to certain retiree prescription drug plans.[1] According to the Congressional Budget Office, the six-year delay of the Cadillac Tax alone would have reduced federal revenues during the 2017–2026 period by roughly $66 billion (albeit not all of the $66 billion would have translated to employer savings).

After it was unveiled in two House committees on March 6, the AHCA immediately drew opposition from both the Freedom Caucus (a conservative faction of House Republicans) and some moderate House Republicans. Those two groups, however, objected to the AHCA on different — and competing

— ideological grounds, leaving the GOP House Leadership and Trump Administration with a Sisyphean task: amending the AHCA to secure "yes" votes from one group likely would guarantee "no" votes from the other group and cause at least some House members who were in the "yes" column to withdraw their support. Acknowledging his party's inability to whip the votes necessary to pass the AHCA in the Republican-controlled House, Speaker Ryan stated in his March 24 press conference that "[the ACA] is the law of the land . . . for the foreseeable future." Several news outlets, however, reported on March 28 that the Republican leadership and the Trump administration had revived negotiations for legislation to repeal and replace the ACA, casting doubt whether Congressional Republicans truly intend to abandon their efforts to repeal and replace the ACA this year.

Even if Republicans postpone or abandon their attempts to repeal and replace the ACA, it is possible that Congress will pass bipartisan legislation this year that revises certain aspects of the ACA, including the Cadillac Tax and employer mandate (both of which have garnered some Democratic opposition). Regardless of any legislative action by Congress, however, the federal agencies with enforcement authority over the current ACA rules can issue, revise, or withdraw regulatory and sub-regulatory guidance regarding certain aspects of the ACA, including those that impact GHPs and employer-sponsors. Further, the outcome of *House v. Price*, a pending federal court case that challenges the Department of Health and Human Services' (HHS) use of federal funds to pay for cost-sharing reduction (CSR) subsidies on the public health insurance exchanges, could have a significant impact on the individual insurance market, forcing Congress to reopen debate about ACA-related legislation.

Reconciliation and the Important Role it Plays in Repeal and Replacement

The Reconciliation Process

Even though Republicans control the White House and have majorities in both the House and Senate, general legislative rules in the Senate require 60 votes to invoke cloture, a procedure that ends debate and prevents legislation from being filibustered; Republicans currently control only 52 Senate seats. Given their lack of a filibuster-proof majority in the Senate, Republicans in Congress attempted to pass the AHCA using reconciliation, a process that allows for expedited consideration of certain legislation that has more than an incidental impact on outlays (spending) and revenues. Most importantly, reconciliation legislation requires only 51 votes to pass in the Senate.

The reconciliation process begins with Congress' passage of a budget resolution, a nonbinding action that directs applicable committees in the House to create a federal budget using reconciliation. The budget resolution is a condition for using the reconciliation process (*i.e.*, Congress cannot wield reconciliation as a tool to pass legislation whenever it pleases). The AHCA was proposed to pass as part of the 2017 fiscal year budget (based on a resolution passed in January 2017), and the current continuing budget resolution expires on April 28, 2017. Because Congress essentially will not be in session from April 8 to 24, there is a very small window of opportunity for Congress to take another shot at repealing the ACA as part of the 2017 fiscal year budget should it wish to pursue that route. Otherwise, Congress will have to wait until the 2018 fiscal year budget resolution to attempt to use reconciliation to repeal, replace or revise the ACA. Congress is expected to begin working on the 2018 fiscal year budget resolution as early as May or June of this year.

The Byrd Rule

Under the Byrd Rule, a component of the Congressional Budget Act that applies to reconciliation in the Senate, certain legislative provisions are considered outside the scope of reconciliation (which the Byrd Rule refers to as "extraneous"). In general, a provision is considered "extraneous" if, with some exceptions:

- It does not produce a change in outlays or revenues;
- It produces an outlay increase or revenue decrease when the instructed committee is not in compliance with its instructions;
- It is outside the jurisdiction of the committee that submitted the title or provision for inclusion in the reconciliation measure;

- It produces a change in outlays or revenues which is merely incidental to the non-budgetary components of the provision;
- It would increase the deficit for a fiscal year beyond the "budget window" covered by the reconciliation measure; or
- It recommends changes in Social Security.

Largely because of the reconciliation requirements outlined above, the AHCA did not seek to repeal the ACA's coverage and benefit mandates relating to GHPs, such as the ACA's prohibitions against annual and lifetime dollar limits on "essential health benefits," pre-existing condition exclusions, the limits on maximum out-of-pocket expenses for in-network GHP benefits, and the requirement for GHPs to cover in-network, preventive health services at no cost to the participant. But some advocates of ACA repeal have argued that a bill repealing the ACA in its entirety would not be considered extraneous under the Byrd Rule; rather, a one-sentence reconciliation bill repealing all of the ACA would, as a whole, have more than an incidental impact on outlays and revenues. The issue of whether such a repeal bill would comply with the Byrd Rule has never been adjudicated by the Senate Parliamentarian, a non-partisan employee who advises the Senate's Presiding Officer (the Vice President, if in attendance) on ruling whether a particular provision is extraneous in response to a "point of order" challenge (an objection by a Senator to a reconciliation provision or provisions) on the Senate floor. It is rare for the Presiding Officer to disregard the Parliamentarian's advice, but the Presiding Officer has that option. Moreover, the majority party also may remove the Parliamentarian. Accordingly, there exists a possibility that Congressional Republicans will propose ACA repeal and replacement legislation in the future that goes far beyond the changes sought by the AHCA (albeit no evidence currently suggests that Congressional leadership is committed to using such an approach).

Potential Executive Branch Changes to the ACA

Without the passage of an ACA repeal-and-replacement bill by Congress as part of the 2017 fiscal year budget resolution, any agency-level changes (*i.e.*, changes by HHS, the IRS, or DOL) to the ACA and related rules for GHPs over the next few months (*i.e.*, prior to the passage of the fiscal year 2018 budget resolution) likely will be less significant than the changes that were proposed by AHCA. Revising, withdrawing, and issuing new agency regulations must comply with the Administrative Procedures Act (APA), which imposes certain advance-notice and timing requirements and effectively prevents the government from making such regulatory guidance effective immediately. In contrast, governmental agencies also can issue "sub-regulatory" guidance (*e.g.*, FAQs) that would not be subject to the same procedural requirements as regulatory guidance (if considered an "interpretive rule" for purposes of the APA) but also would not carry the same authoritative weight. Lastly, governmental agencies can change enforcement priorities for — or delay enforcement of — statutes over which they have jurisdiction (*e.g.*, the IRS' delayed enforcement of the employer mandate from 2014 to 2015).

With regard to ACA statutes contained in the Public Health Service Act (PHSA), HHS could take action that would affect group plans, such as revising the current regulations for the preventive health services mandate to cut back on services which are considered "preventive" (*e.g.*, to exclude emergency contraceptives). The DOL (ERISA), Department of Treasury and IRS (Internal Revenue Code) also could make ACA-related changes at the regulatory and sub-regulatory levels. For example, the IRS could delay the deadlines for ACA reporting in 2018 on Forms 1094 and 1095 (for 2017 coverage), an administratively burdensome requirement for many employers, as well as make the "good faith efforts" penalty relief available for another year. Both ACA-reporting actions by the IRS arguably would not be subject to the APA's formal rulemaking requirements. Similarly, Treasury could make significant changes to the employer mandate regulations, which contain the vast majority of the employer mandate requirements (albeit the IRS would need to follow the

notice, timing and other formal APA requirements when making such regulatory changes).[2]

House v. Price: An Appropriations Dispute with Major Implications

House v. Price, a lawsuit pending in federal court, was brought by the House of Representatives in July 2014 against the Obama administration and claims that certain reimbursements to insurers by HHS violate Article I, Section 9, Clause 7 of the United States Constitution (referred to as the "Appropriations Clause").[3] The ACA includes a provision requiring (1) insurance carriers on the exchanges to reduce cost sharing for enrollees with incomes less than 250% of the federal poverty level; and (2) HHS to reimburse insurance carriers for those cost-sharing reductions (CSRs). According to the House, the ACA does not provide a permanent appropriation of federal funds for CSR reimbursements by HHS (in contrast to the ACA's appropriation for premium subsidy payments). A district court in Washington, D.C. ruled in favor of the House and enjoined the future payments made by HHS to insurance carriers with regard to CSRs, but the ruling currently is being held in abeyance (*i.e.*, placed on hold) pending an appeal by the Trump administration.[4] HHS has approved payments to the insurance carriers for February 2017, and it seems likely they will do so for March as well.

A cessation of CSR reimbursements to insurance carriers would cause dramatic increase in out-of-pocket costs for a substantial number of public health exchange enrollees. As a result, exchange coverage likely would become unaffordable for a significant percentage of enrollees and prospective enrollees, dampening current and future enrollment. And if insurance carriers on the exchanges continue to be required to provide CSRs for exchange plans but are not reimbursed for those CSR costs, most — if not all — carriers would leave the exchanges. Such an enrollment reduction and insurer exodus likely would cause the exchanges to collapse.

Paul Ryan has stated that HHS will continue to provide CSR reimbursements pending the resolution of *House v. Price*, but it remains to be seen whether HHS Secretary Price sees eye to eye with the House Speaker. The Trump administration, for example, cancelled millions of dollars of pre-paid ads for the 2017 open enrollment period of the exchanges, suggesting an unwillingness to dedicate federal resources toward boosting exchange enrollment. Although the exchanges survived the withdrawal of administration support, it is unlikely that the exchanges could survive a refusal of HHS to reimburse insurers for cost-sharing subsidies. (The next status updates from the parties in *House v. Price* are due in May 2017. Insurers have until June 21, 2017 to decide if they want to participate in the exchanges in 2018.) There is speculation that a collapse of the exchanges might galvanize Republicans and Democrats to work together to pass significant changes to ACA, some of which could relate to GHPs, but it is unclear if (or when) such bipartisan action would take place.

The Uncertain Future of the ACA

The AHCA's downfall likely does not spell the end of Republican efforts this year to dismantle or significantly revise the ACA, including the employer mandate and Cadillac tax — arguably the two ACA provisions with the greatest impact (or potential impact) on GHPs and employer-sponsors. Passage of bipartisan ACA-related legislation this year remains a possibility as well, the likelihood of which may depend in part on the stability — or instability — of the individual insurance markets (and the outcome of *House v. Price*). Lastly, at least some of the executive agencies with authority to enforce ACA rules (HHS, Treasury, IRS and DOL) likely will issue guidance revising the current rules. For those reasons, employers who sponsor GHPs have a strong incentive to continue to pay close attention to ACA-related developments in Congress and the Trump administration.

For footnotes, see following page.

[1] In addition to Trucker Huss' special alert, further background and discussion of the AHCA are available in two Business and Legal Resources (BLR®) articles dated March 16 and March 27 that include commentary from me.

[2] The IRS still has not imposed any employer mandate penalties for 2015, on which employers reported compliance in 2016. It is unclear whether Treasury or the IRS intend to scale back or delay enforcement of the employer mandate, or whether any new relief would apply to prior years.

[3] Thomas Price is now the Secretary of HHS under the Trump administration. Because the case was filed during the Obama administration, it was titled *House v. Burwell* (a reference to then–HHS Secretary Sylvia Matthews Burwell).

[4] The Trump administration asserts that it asked for a stay of the district court's ruling because Congress intended to address the CSR issue in the AHCA.

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The Trucker ✦ Huss *Benefits Report* is published monthly to provide our clients and friends with information on recent legal developments and other current issues in employee benefits. Back issues of *Benefits Report* are posted on the Trucker ✦ Huss web site (www.truckerhuss.com).

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