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ACA Replacement Clears Its First Hurdle: An Analysis of What's Next

(Trucker Huss Webinar on May 24)

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On Thursday, May 4, the House of Representatives narrowly passed the American Health Care Act (AHCA), a budget reconciliation bill that would repeal and replace many provisions in the Patient Protection and Affordable Care Act (ACA) that relate to the individual insurance market, Medicaid and employer-sponsored group health plans (GHPs). This version of the AHCA includes most of the same GHP-related provisions as the version Speaker Paul Ryan withdrew from a House vote in March (see our prior article on the AHCA). And to secure the necessary votes, the current version also includes an amendment that would allow any state to seek waivers of certain ACA mandates, including the requirement for insurers to cover essential health benefits (EHBs) in the state's individual and small-group insurance markets. One state's waiver of the EHB requirements (*i.e.*, the elimination of EHBs) would potentially impact self-funded GHPs in every state: the ACA's current in-network out-of-pocket maximum requirements and prohibitions of annual and lifetime limits apply only to GHP-covered benefits that are considered EHBs on a state benchmark plan of the GHP's choice. So the AHCA could permit any GHP to select a waiver state's EHB-free benchmark plan, impose annual and lifetime limits on any type of covered benefit, and eliminate out-of-pocket maximums for in-network benefits.

The AHCA most likely is not the healthcare bill — if any — that will reach the President's desk for signature. Rather, the Senate has indicated that it will prepare its own reconciliation bill in lieu of voting on the AHCA. GHP-related provisions similar to those in the AHCA are reasonably likely to appear in the Senate's bill. But a number of Republican Senators, each of whom represents a statewide constituent base rather than a House district, have publically opposed the AHCA's state-waiver program and proposed cuts to Medicaid funding. So the Senate's bill, which must receive the support of at least 50 of the 52 Republican Senators (the Vice President can cast the 51st vote), likely will differ from the AHCA in at least some aspects. Any differences between the Senate bill and the AHCA must then be approved by the House through a floor vote or resolved during a House-Senate committee conference, a process where both chambers of Congress work to combine the House and Senate versions into a single bill.

The Senate is expected to release its healthcare bill before the end of May. And because of the reconciliation rules and Republican legislative priorities, Congress essentially must pass this legislation before moving on to tax reform or any other topic it intends to address with reconciliation. So employers, multiemployer GHP sponsors and other stakeholders can expect to see new legislative developments soon — potentially before the end of this month. We will be presenting a webinar on this topic on ***May 24*** (register here).

The AHCA's State-Waiver Provisions and Their Potential Impact on GHPs

The AHCA includes an amendment that would allow states to seek the following waivers from the certain ACA requirements for in-state individual and small-group insurance plans:

1. Waiver of the maximum age-based pricing ratio. The ACA currently caps the premium amount insurers can charge older enrollees to a 3:1 ratio — that is, insurers are limited to charging the oldest enrollees no more than three times' the cost of premiums that are set for the youngest enrollees. The AHCA would increase this ratio to 5:1 but allow states to seek a waiver of this requirement and price premiums using an even higher ratio beginning in 2018.

2. Waiver of the EHB-coverage requirements. The ACA requires insurers to cover all benefits that are considered EHBs in the state. Beginning in 2020, the AHCA would permit a state to waive this requirement and define its own EHBs — or eliminate EHBs entirely.

3. Waiver of the requirement to use community rating. The ACA requires insurers to use community rating, which prohibits the use of health status for purposes of determining premiums for a particular enrollee. Beginning in 2019 (and for 2018 special enrollment), the AHCA would allow states to seek a waiver of the ACA's community rating requirements for enrollees who previously had a gap in coverage of at least 63 days. Insurers then would be permitted to use medical underwriting to determine such an enrollee's premiums for essentially the first 12 months of the enrollee's coverage.[1]

If a state applies for and receives a waiver of the ACA's EHB requirements (#2 above), the waiver potentially would impact all self-funded GHPs that cover active employees — even GHPs that are not sitused in the waiver state. The ACA's prohibition against annual and lifetime limits and in-network out-of-pocket-maximum requirements apply only to the EHBs that are both covered by the GHP and listed on the state benchmark plan of the GHP's choice.[2] So if a state received a waiver of all EHBs, for example, self-funded GHPs in every state presumably could select that state's EHB-free benchmark plan and (1) impose annual and lifetime limits on any covered benefits; and (2) eliminate their existing out-of-pocket maximum (a cap on participant and dependent cost-sharing) for in-network benefits. Insured GHPs in non-waiver states generally would be unable to take the same approach as a practical matter: most non-waiver state's insurance laws would continue to prohibit an in-state insurer from issuing a group policy that either places annual and lifetime limits on the state's EHBs or does not cap in-network out-of-pocket costs on those EHBs.

This type of state waiver could pave the way for employers to use health reimbursement arrangements (HRAs) and employer payment plans to pay for individual insurance coverage of all active employees instead of offering employees traditional, major medical coverage.[3] Such HRAs and employer payment plans currently are prohibited based on IRS guidance that they violate the ACA's (1) prohibitions of annual and lifetime EHB limits; and (2) requirement for GHPs to cover preventive care at no cost-sharing. Employers could avoid the annual- and lifetime-limit issues by choosing an EHB-waiver state's benchmark plan for purposes of their HRAs and employer payment plans. And if the IRS revised its existing preventive care guidance to exempt HRAs and employer payment plans that pay for individual insurance, employers would no longer be restricted by the ACA from offering those plans in lieu of major medical GHP coverage.

The Trump administration has not expressly proposed this approach for HRAs and employer payment plans. Nor have the federal courts adjudicated the issue of whether the IRS and other executive agencies have the regulatory or sub-regulatory authority to exempt these plans from the preventive care requirements. So it ultimately is unclear whether the AHCA, combined with executive branch guidance, could eliminate the current restrictions on the payment of individual insurance premiums and other expenses by HRAs and employer payment plans.

Senate Legislation

As explained in our prior ACA-repeal articles, the budget reconciliation process immunizes eligible legislation from the Senate filibuster, which would otherwise require the approval of 60 Senators to end debate and commence a vote on the legislation.[4] The Senate instead can pass this filibuster-proof legislation with a simple 51-vote majority (at least 50 Senators plus a tie-breaking vote from the Vice President). From a political standpoint, use of the reconciliation process appears to be a practical necessity for Senate Republicans, who control only 52 senate seats and don't currently expect to receive any Democratic support for ACA-replacement legislation.

In contrast to the Medicaid cuts and individual market changes that have received strong public opposition from at least some Republican Senators, the following GHP-related provisions in the AHCA (described in our March 2017 articles available here and here) appear to have a reasonable chance of making it into the Senate's healthcare bill:

1. ***Repeal of the individual mandate.*** Eliminating this tax penalty could cause some GHP enrollees to drop coverage voluntarily according to the Congressional Budget Office (CBO) and Joint Committee on Taxation (JCT).[5] Although the likely cost-range of those individuals is unclear, younger, healthier individuals are presumably more likely than older, sicker individuals to decline coverage in the absence of the individual mandate penalty.

2. ***Repeal of the employer mandate penalty.*** This change would allow employers to scale back (or simplify) GHP eligibility without fear of triggering hefty employer tax penalties. And the House summary of the AHCA includes the following statement that appears to signal that the IRS and Treasury Department will simplify the current ACA reporting rules for employers and GHPs once the AHCA eliminates the employer mandate penalty and restructures the insurance tax credits (which also affect reporting):

   > The program also calls for simplified reporting of an offer of coverage on the W-2 by employers. Reconciliation rules limit the ability of Congress to repeal the current reporting, but, when the current reporting becomes redundant and replaced by the reporting mechanism called for in the bill, then the Secretary of the Treasury can stop enforcing reporting that is not needed for taxable purposes.

3. ***Delay of the Cadillac tax.*** The Cadillac tax is a 40 percent, 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.[6] The AHCA would delay the Cadillac tax until 2026 rather than repeal the tax completely.[7]

4. ***Eliminate the health flexible spending account ("FSA") employee contribution limits.*** Elimination of these limits would allow employers to specify higher employee-contribution amounts for health FSAs, which were relatively common prior to passage of the ACA. Those employers would save additional FICA (Social Security and Medicare) taxes if employees contributed more of their salaries to health FSAs instead of receiving taxable compensation. But higher contribution limits increase the employer's risk of loss because the "uniform coverage" rules require health FSAs to make the employee's entire annual election available for reimbursement at any time during the year (*i.e.*, before the employee has actually contributed the full amount from his or her wages).

5. ***Expand HSA contribution limits and general availability.*** The AHCA's proposed changes include, for example, an increase of the annual HSA contribution limits. Given that employee HSA contributions are tax-free when made through a cafeteria plan, the AHCA's proposed HSA expansions would potentially increase employers' FICA tax savings on the additional contributions.

6. ***Repeal the ACA's prohibition of tax-free reimbursements of over-the-counter medications by HSAs and other account-based plans.*** As with the other proposed changes to the HSA and health FSA rules, this change could potentially increase employers' and employees' tax savings.

7. ***Repeal the ACA's limit on employer deductions relating to certain retiree prescription drug plans.*** Many employers who previously offered retiree health plans and received the retiree drug subsidy (RDS) changed the structure of (or eliminated) those plans in part because of the ACA provision that essentially reduced the available employer deduction by the amount of the RDS payments received by the plan. The repeal of this ACA provision would allow employers to again take advantage of the larger pre-ACA deduction available.

Given that the AHCA's state-waiver provision has received pushback from some Republican Senators, who hold a narrow Senate majority, it is less likely than the above GHP-related provisions to appear in the Senate's ACA-replacement bill. It also is unclear whether such a state waiver provision complies with the Senate's Byrd Rule, a reconciliation requirement that excludes legislative provisions that have only an "incidental" impact on outlays or revenues. Although individual state waivers of the ACA's rules for age-pricing ratios, EHBs and community rating would impact federal spending to some degree (*e.g.*, tax credit utilization or grants for high-risk pools), Senate Republicans likely would face an uphill battle if they argue that the impact is more than incidental for purposes of the Byrd Rule.[8]

Upcoming Trucker Huss Webinar

Efforts to repeal and replace the ACA face another key hurdle in the Senate, where Republicans hold a smaller majority than in the House. Many Senate Republicans appear intent on diverging ideologically from their counterparts in the House and crafting a bill with a number of substantive differences from the AHCA — some of which could relate to GHPs and employers. In light of all the ACA developments over the past few months, we will be presenting an updated webinar on ACA repeal and replacement on May 24 (similar to our ACA webinar in January 2017). You can register for the webinar here.

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[1] To receive a waiver from the community rating requirements, the state would have to adopt one of the programs designed to reduce costs for high-risk enrollees under the AHCA's Patient and State Stability Fund.

[2] The ACA does not require GHPs to cover EHBs but imposes cost-sharing requirements and prohibits lifetime and annual limits on any EHBs that those GHPs cover.

[3] Currently, as many as 150–170 million (roughly 50–55%) of Americans receive major medical coverage through their employers. But that percentage has continued to decrease over the past two decades, according to the Kaiser Family Foundation, from up to 67% in 1999. Allowing employers to replace their major medical plans with HRAs or employer payment plans likely would further decrease the number of individuals with major medical GHP coverage.

[4] Theoretically, the Senate Majority Leader, Mitch McConnell, could eliminate the filibuster for general legislation; and the Presiding Officer of the Senate could ignore the advice of the Senate Parliamentarian regarding whether a particular provision violates the reconciliation rules. Both approaches would reduce or eliminate the need to comply with the reconciliation requirements for legislation to be budgetary in nature (*i.e.*, allow broader repeal and replacement legislation). But neither party in the Senate has taken either approach in recent history, largely because of the political consequences (*e.g.*, voter outrage) and eliminating rights of the minority party would eventually harm the current majority (because the majority party always loses its majority at some point in the future). Nor has the Republican leadership stated or indicated that it would either eliminate the legislative filibuster or disregard the Senate Parliamentarian; nonetheless, each remains a possibility.

[5] The CBO and JCT stated in their March 17 analysis of the AHCA that: "Most of that increase [of 14 million uninsured] would stem from repealing the penalties associated with the individual mandate. Some of those people would choose not to have insurance because they chose to be covered by insurance under current law only to avoid paying the penalties, and some people would forgo insurance in response to higher premiums." The CBO and JCT analysis did not identify which portion of the projected uninsured increase would be attributable to individuals dropping GHP coverage (as opposed to dropping individual insurance coverage).

[6] 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.

[7] A complete elimination Cadillac tax that is not accompanied by an offsetting revenue increase (*e.g.*, caps on the tax exclusions for GHP contributions and benefits) arguably would increase the deficit beyond the 10-year window covered by the fiscal year 2017 budget resolution — a violation of the reconciliation requirements (Byrd Rule). In contrast, a six-year delay of the Cadillac would increase the deficit only for years inside the 10-year budget window.

[8] As explained above, the Senate Presiding Officer, a Republican, theoretically could ignore any advice from the Parliamentarian that a state waiver provision violates the Byrd Rule.

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