Potential Impact of Senate Health Care Bill: A Closer Look

ERIC SCHILLINGER

Originally published by Law360.com on June 28, 2017.

On June 22, 2017, Senate Republicans unveiled a "discussion draft" of the Better Care Reconciliation Act of 2017 (BCRA), a bill that seeks to repeal, replace, revise or delay many of the federal health care laws enacted in 2010 by the Patient Protection and Affordable Care Act (ACA).[1] And on June 27 Senate Majority Leader Mitch McConnell, R-Ky., announced that the Senate will not vote on the BCRA until after the Senate's July 4 recess. The BCRA's release and postponement are the latest major developments in Congressional Republicans' efforts to replace the ACA using "budget reconciliation" since the House's passage of the American Health Care Act (AHCA) on May 4.

The BCRA and AHCA propose many of the same changes (e.g., repealing the employer mandate penalties and delaying the Cadillac tax) that would affect employer-sponsored group health plans (GHPs) — the single largest source of health coverage for Americans. Enactment of those changes would significantly reduce the tax, administrative and legal-compliance costs borne by GHP sponsors. But considerable constituent opposition to these proposals, a daunting Congressional Budget Office forecast of the BCRA's increase of the uninsured rate, complex budget reconciliation limitations, and Republicans' slim — and factious — majority in the Senate have raised the specter of uncertainty for interested employers, employees and other GHP stakeholders.[2]

2017 Timeline of the ACA-Replacement Process

- January 2017: Republicans, who now control both chambers of Congress and the executive branch, begin the ACA-replacement process by passing a budget resolution that includes reconciliation instructions (see my January article in Law360).
- March 6: House Republicans unveil the initial draft of the AHCA (see my March 17 Law360 article).
- March 24: House Speaker Paul Ryan, R-Wis., cancels a House vote on the AHCA after determining the bill would likely fail to pass a floor vote (see my April 6 Law360 article).
- May 4: The House passes a revised version of the AHCA, which includes most of the same GHP-related changes as the March version.

Copyright © 2017 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date which appears at the end of each article, are general in nature and are not the substitute for legal advice or opinion in a particular case.

- June 22: McConnell releases a draft of the BCRA.
- June 26: McConnell releases an amended draft of the BCRA.
- June 27: McConnell postpones a Senate vote on the BCRA until after the July 4 recess.
- Uncompleted Step 1: The Senate passes the BCRA.
- Uncompleted Step 2: The House passes the Senate's BCRA, or both parties pass combined legislation via a conference committee.
- Uncompleted Step 3: President Donald Trump signs ACA-replacement legislation into law.

BCRA Provisions That Would Impact GHP Stakeholders

Repeal of the individual mandate penalties: Both the BCRA and the AHCA propose eliminating (i.e., reducing to $0) the penalties for individuals who do not obtain minimum essential health coverage, retroactive to 2016. This change potentially raises an adverse selection issue for GHP sponsors: Younger, healthier individuals are theoretically more likely than older, sicker individuals to drop or decline GHP coverage if there is no penalty for not carrying health insurance, presumably at the detriment to GHP risk pools.[3] But the average health status of these potential GHP disenrollees and nonenrollees is ultimately unclear. Nor is it clear that such an enrollment reduction would have a significant adverse impact on employers' or enrollees' GHP costs.

Repeal of the employer mandate penalties: Both the BCRA and the AHCA would eliminate the employer mandate penalties retroactive to 2016. This change would allow employers to scale back (or simplify) GHP eligibility without fear of triggering hefty employer tax penalties.[4] The BCRA also proposes to change the eligibility rules for the ACA's health insurance tax credits under Section 36B to exclude anyone who is eligible for GHP coverage starting in 2020. Arguably the combination of this change and the elimination of the employer mandate penalties would greatly simplify employers' reporting requirements under Internal Revenue Code Sections 6055 and 6056. Currently, most large employers must provide complex data on full-time employee status, GHP coverage and GHP "affordability" for the IRS to enforce the employer mandate, individual mandate and the ACA subsidies. So without those penalties and affordability-based tax credits, this complex employee and GHP information would arguably be irrelevant. Employers would instead need to report only whether employees and other individuals (e.g., spouses and children) are simply eligible for GHP coverage for each month in the year.[5]

Delay of the Cadillac tax: The BCRA and the AHCA both propose delaying the Cadillac tax for six years, until the start of 2026. This 40 percent, deductible excise tax would otherwise take effect in 2020 and apply annually to certain GHP coverage that, in the aggregate (e.g., major medical coverage offered with a health flexible spending account (FSA)), exceeds $10,200 for individual coverage, and $27,500 for family coverage.[6] According to the CBO's June 26 report, the BCRA's six-year delay would decrease federal revenues by roughly $66 billion over a 10-year period. This revenue decrease would presumably result from a combination of (1) lost Cadillac tax penalties from 2020 to 2026, and (2) lost income and employment taxes on amounts that employers would choose to pay as wages from 2020 to 2026 instead of towards tax-free GHP coverage (i.e., from employers scaling back GHP coverage to avoid the Cadillac tax).

Copyright © 2017 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date which appears at the end of each article, are general in nature and are not the substitute for legal advice or opinion in a particular case.

More favorable rules for health FSAs, health savings accounts (HSAs), and other account-based plans: Both the BCRA and the AHCA propose to: (1) eliminate the limit on salary reduction contributions to health FSAs (currently $2,600); (2) expand contribution limits and other aspects of HSAs; and (2) repeal the ACA's prohibition of tax-free reimbursements of most over-the-counter (OTC) medications by health FSAs, HSAs and similar arrangements. The BCRA generally makes changes effective starting in 2018 (2017 for the OTC changes); in contrast, the AHCA makes the changes retroactive to the start of 2017. Employers would realize additional savings on Federal Insurance Contributions Act (Social Security and Medicare) taxes to the extent employees increase their tax-free contributions instead of electing to receive the amounts as taxable wages.

Repeal the ACA's limit on employer deductions relating to certain retiree prescription drug plans: This change would allow employers whose retiree health plans receive retiree drug subsidy (RDS) payments to again take advantage of the larger pre-ACA tax deduction available. The ACA currently reduces the available employer deduction by the amount of RDS payments received by the plan.

State waivers of certain ACA mandates: Both the BCRA and AHCA allow states to seek waivers of, among other ACA mandates, the requirement for insurers in the state's individual and small-group markets to cover all essential health benefits (EHBs). (Large GHPs are not required to cover EHBs.) Under such a waiver, the state could define fewer EHBs — or eliminate EHBs entirely. With regard to self-funded GHPs, the current regulations provide that the ACA's in-network out-of-pocket-maximum (i.e., total cost-sharing) requirements and prohibition against annual and lifetime limits apply only to GHP-covered benefits that are listed as EHBs on the state "benchmark plan" of the GHP's choice. So if a state received a waiver of all EHBs, for example, self-funded GHPs in every state theoretically could select that state's EHB-free benchmark plan and (1) impose annual and lifetime limits on any covered benefits; and (2) eliminate out-of-pocket maximums for in-network benefits. But neither the AHCA nor the BCRA, each of which contains different statutory language for state waivers, expressly states that such an EHB waiver would apply for purposes of the GHP rules. And arguably both statutes could be read narrowly to apply only in the context of individual and small-group plans — not large GHPs. So it is ultimately unclear whether these state EHB waivers would actually extend to GHP mandates.

Looming Battle Over the Budget Reconciliation Rules

The reconciliation process immunizes eligible legislation from the Senate filibuster, a 60-vote requirement to invoke cloture (i.e., end debate), which allows the Senate to pass such bills with a simple 51-vote majority. And because of the Constitution's bicameral clause, which requires legislation to pass in both chambers of Congress, reconciliation is a necessity for the 52 Senate Republicans; it is a near certainty that every single Democratic Senator would vote against invoking cloture.

The reconciliation requirements — particularly, the so-called "Byrd Rule" — arguably prohibit Republicans from addressing nonbudgetary aspects of the ACA; namely, the insurance mandates (e.g., ban on pre-existing condition exclusions). But as explained below, the party in control of the Senate and vice presidency wields immense power over the interpretation and enforcement of the Byrd Rule (albeit flouting the rules would likely come at a severe political cost). The BCRA and

Copyright © 2017 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date which appears at the end of each article, are general in nature and are not the substitute for legal advice or opinion in a particular case.

AHCA contain several arguably impermissible provisions, paving the way for a potential Senate floor dispute over Byrd Rule compliance (often referred to as a "Byrd Bath").

Byrd Rule Limitations on ACA Replacement Legislation

The Byrd Rule essentially limits the scope of reconciliation-eligible legislation to provisions that have more than an incidental impact on federal outlays (i.e., spending) and revenues and do not violate certain other requirements. Under this rule, six core categories of provisions are prohibited in reconciliation legislation (referred to as "extraneous"); and a number of complex exceptions that apply to one or more of those categories. A provision is generally extraneous if:

1. It does not produce a change in outlays or revenues;
2. It produces an outlay increase or revenue decrease when the instructed committee is not in compliance with its instructions;
3. It is outside the jurisdiction of the committee that submitted the title or provision for inclusion in the reconciliation measure;
4. It produces a change in outlays or revenues which is merely incidental to the nonbudgetary components of the provision;
5. It would increase the deficit for a fiscal year beyond the "budget window" covered by the reconciliation measure (generally 10 years); or
6. It recommends changes in Social Security.

If a provision is ruled extraneous under numbers one, two, four or five above, it is removed from the bill. But if a provision is ruled extraneous under number three or number six, the entire bill loses its filibuster-proof status. Below are examples of potentially extraneous provisions:

- A provision that completely repeals the Cadillac tax potentially violates rule number five above by increasing the deficit for fiscal years after 2026. In contrast, a delay of under 10 years (e.g., the AHCA's and BCRA's six-year delay) arguably would not violate number five. Such a delay, however, could still violate rule number two because the Cadillac tax is under the jurisdiction of the Senate Finance Committee and arguably results in a revenue decrease. The revenue decrease would be impermissible if the portion of the BCRA under the Finance Committee's jurisdiction as a whole fails to comply with the reconciliation instructions (i.e., does not achieve the specified reductions in outlays or revenues).
- The following provisions arguably violate rule number four above: (1) for new enrollees in the individual market who fail to maintain continuous health insurance coverage, the BCRA provision permitting insurers to impose a six-month pre-existing condition exclusion and the AHCA permitting a 12-month, 30 percent premium surcharge; and (2) the BCRA's and AHCA's state waiver provisions (described above). While those provisions would impact outlays and revenues (e.g., likely decrease tax credit utilization), the impact is arguably "incidental" to the provisions' insurance coverage-related (i.e., nonbudgetary) components.

Copyright © 2017 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date which appears at the end of each article, are general in nature and are not the substitute for legal advice or opinion in a particular case.

Will the GOP Enforce the Byrd Rule During a Senate Vote on the BCRA?

It is a common misconception that the Senate parliamentarian, a nonpartisan employee of the Senate, provides "authoritative" guidance on Byrd Rule compliance. But the actual role of the parliamentarian is that of an adviser — not a referee. And as explained below, the presiding officer, Budget Committee chair and majority party — all under Republican control — have considerable authority over interpreting and applying the Byrd Rule:

- **Presiding Officer:** The Byrd Rule makes clear that the presiding officer — not the parliamentarian — has the final say (unless overruled by 60 senators) on whether a provision is extraneous. The vice president serves as the presiding officer, when in attendance. There does not appear to be any instance in recent history where the presiding officer ignored the parliamentarian's advice; nonetheless, Vice President Mike Pence (or another Republican presiding officer) has that option.

- **Budget Committee Chair:** The Senate Budget Committee chair has the final authority to determine how the budgetary impact of a reconciliation bill is scored. The chair has historically relied on the CBO and Joint Committee on Taxation (JCT) for this purpose, but is not required to do so as a matter of law. So Republicans have the option to use dynamic scoring, a methodology that would likely soften the projected deficit increases of their ACA tax cuts. At this point, however, the Senate appears intent on respecting the CBO and JCT's scoring, which was released on June 26.

- **Majority Party:** The majority party may remove the parliamentarian, a step Republican Senators took in 2001 when then-parliamentarian Robert Dove advised that a number of provisions in the Republican's proposed tax reform legislation were extraneous. Presumably, Republicans determined that removing Dove as parliamentarian was preferable to the precedent-setting approach of expressly ignoring his advice.

The Senate minority lacks a legal mechanism (i.e., the ability to file a federal lawsuit) to enforce Byrd Rule violations against the majority party. So the consequences of including questionable provisions in a reconciliation bill arguably are better characterized political in nature: A presiding officer's ruling against the parliamentarian's advice sets actual Senate precedent — and in this case, would further diminish the minority party's rights. Those political consequences are nonetheless severe: Democrats will eventually regain control of the Senate, at which time they could use the same approach to push through their agenda.

As explained above, the BCRA (and the AHCA) include a number of arguably extraneous provisions (e.g., state waivers of ACA insurance mandates). So in the event that the parliamentarian advises that any BCRA provisions are extraneous, Republicans will be forced to decide whether ignoring that advice is worth the high political cost.

Copyright © 2017 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date which appears at the end of each article, are general in nature and are not the substitute for legal advice or opinion in a particular case.

What Lies Ahead?

Although congressional Republicans have completed major steps in ACA-replacement process, it remains unclear which — if any — changes to the current ACA rules will become law. This continued uncertainty has left employers and other GHP stakeholders in limbo: It is nearly impossible to plan in advance for legal changes that may never materialize. And given that the Senate is not expected to vote before its July 4 recess, the prospects of ACA-replacement legislation reaching the president's desk are likely to remain unclear in the coming weeks.

---

[1] Senate Majority Leader Mitch McConnell released a revised draft of the BCRA on June 26.

[2] Republicans currently control 52 Senate seats, and need 50 votes to pass the BCRA using reconciliation; the vice president can break a 50-50 tie. As of June 27, at least five Republican Senators were publicly opposed to the current version of the BCRA.

[3] According to March scoring released by the CBO, the AHCA would result in roughly 7 million fewer people enrolling in GHP coverage by 2026, in part because "[f]ewer employees would [enroll in GHP] coverage in the absence of the individual mandate penalties." Similarly, CBO scoring published on June 26 estimated that the BCRA would reduce GHP enrollment by up to 4 million in 2018, but by fewer than 500,000 individuals on and after 2023.

[4] The June 26 CBO report on the BCRA estimates that the elimination of penalties paid by employers (e.g., employer-mandate penalties) would decrease federal revenues by roughly $171 billion over 10 years. The report also states that the BCRA likely would cause some employers to offer health coverage to fewer employees.

[5] This change to tax-credit eligibility presumably eliminates the ACA's "family glitch." The family glitch currently occurs when an employee's family members are barred from receiving the ACA's tax credits because the employee qualifies for "affordable" GHP coverage, a determination that essentially does not take into account the cost or availability of family coverage. Those family members end up without ACA subsidies — and potentially, without GHP coverage as well. By eliminating the "GHP affordability" component of ACA subsidies, each family member's subsidy eligibility is determined based on his or her eligibility for GHP coverage, rather than the employee's eligibility for affordable GHP coverage. So because a family member's subsidy eligibility would not be contingent on an employee-only variable (employee affordability), the ACA's family glitch would no longer exist.

[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.

JUNE 2017

EMAIL ERIC SCHILLINGER

Copyright © 2017 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date which appears at the end of each article, are general in nature and are not the substitute for legal advice or opinion in a particular case.