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## ACA Repeal and Replace Update: Legislative Posture and Potential Group Health Plan Impacts

Earlier this month, the House proposed and advanced ACA repeal and replace legislation, referred to collectively as the American Health Care Act (AHCA or proposal). At that time, the Congressional Budget Office (CBO) had not provided estimates on the deficit impact or the number of individuals who could lose coverage under the plan. As has now been widely reported, CBO provided their estimate noting that the plan reduces the deficit by billions over ten years and could result in millions of people losing coverage. The next step is for proposal to move to the House Budget Committee, after which it will advance to the Rules committee where substantive changes can be made. If changes are made, the CBO will provide a revised estimate of the cost and the number of individuals who could lose coverage. This is all likely to happen quickly. GOP leaders are pushing for a full House vote on the AHCA the week of March 20. If the AHCA passes the House, it moves to the Senate for consideration.

### What Could Happen on the Way to the Senate

A number of changes could be made to the AHCA and Democrats could make procedural points of order, which challenge the scope of the proposal if it goes beyond what is permitted for budget reconciliation legislation. As we have noted in prior [Alerts](#) and in our [post-election webinar](#), budget reconciliation legislation is limited to changes in taxes and spending. In addition, if the bill makes it to the Senate, a number of Republican Senators have expressed concern over the legislation. With a 52-48 majority, it would take just three Republican Senators to compromise the majority required to pass the AHCA into law for the President's signature (Vice President Pence is the deciding vote in the event of a tie).

### Group Health Plan Impacts

The AHCA, while largely focused on Medicaid and the individual market, also significantly impacts group health plans. As the legislation progresses, it is important to start considering those potential impacts.

#### **Pay or Play: Out as of 2016**

The AHCA provides for "zero" penalties for failing to comply with the ACA Pay or Play provisions requiring applicable large employers (ALEs) to offer minimum essential coverage to individuals who work 30 hours a week (determined using the monthly or look-back method). The AHCA effectively nullifies the mandate by eliminating potential penalties effective January 1, 2016. Pay or Play was effective January 1, 2015 so penalties could technically still apply for the 2015 calendar year. The information needed to assess penalties should have been reported to the IRS

in the first ACA reporting cycle. While the IRS may have the information they need to issue penalties, the agency has not released rules or created a process around collecting those penalties. Such regulatory actions are unlikely under the new administration.

### **ACA Employer Reporting (and penalties for reporting failures): Not Out**

The AHCA does not repeal ACA employer reporting (including large employer reporting on full-time employee offers of coverage and minimum essential coverage reporting for employers sponsoring self-funded plans). Employers are still obligated to report and subject to penalties for failing to report until the proposed AHCA tax credit system is effective in 2020.

Employer reporting would not go away completely under the AHCA. The AHCA envisions employers reporting offers of coverage on Form W2 after 2020. Proposed AHCA tax credits are not available if an individual is offered “employer coverage”. It remains unclear what “employer coverage” would disqualify an individual from AHCA tax credits.

### **Cadillac Tax: Not Out . . . Yet**

The Cadillac tax is a 40% deductible excise tax on the value of coverage that exceeds \$10,200 for an individual and \$27,500 for family coverage. The tax has been the target of bipartisan repeal efforts for years, the major hurdle being the significant projected revenue of the tax. While the Cadillac tax was repealed in early drafts of the legislation, it remains in the current proposal but is delayed until 2025. While not totally clear, the Cadillac tax likely remained in the proposal to avoid running afoul of House rules on budget reconciliation (Byrd rule) requiring a bill not increase the federal deficit for a fiscal year beyond 10 years—the life of the bill itself.

Many employers have been planning for the Cadillac tax for several years now. The initial effective date was 2018. That was delayed until 2020 and now possibly until 2025. In light of the current uncertainty, employers should consider the Cadillac tax in their planning, but it is likely the most vulnerable ACA provision, even if the AHCA does not become law.

### **Changes to Account Based Plans (HSAs, FSAs, and HRAs)**

The proposal allows health savings accounts (HSAs), health flexible spending accounts (H-FSAs) and health reimbursement arrangements (HRAs) to reimburse over the counter (OTC) medications without a prescription. The ACA had restricted reimbursements of OTC medications to those with a prescription.

The proposal repeals the ACA’s limits on employee pre-tax contributions to a H-FSA, returning to pre-ACA rules where the plan determines the limit on employee pre-tax contributions to a H-FSA.

Expanded use of HSAs has been a key component of each Republican repeal and replace proposal. The AHCA would increase the annual HSA contribution limit to the out of pocket (OOP) maximum for high deductible health plans (HDHPs). This change would be effective January 1, 2018. For reference, the 2017 OOP maximums for an HDHP plan is \$6,550 for individual coverage and \$13,100 for family coverage.

Note that under the AHCA large employers sponsoring HRAs must continue to integrate those plans with their major medical plans. The prohibition on stand-alone HRAs remains in place for large employers. Some small employers may be able to take advantage of qualified small employer health reimbursement arrangements, as outlined in our [Alert](#).

### **Tax Credit Use toward Unsubsidized COBRA Coverage with Limitations**

Under the ACA, employees that enroll in COBRA coverage are not eligible for subsidies through an Exchange. Under the AHCA, however, individuals would be able to use their tax credit for pay for unsubsidized COBRA coverage as long as the employer's plan does not cover abortions except in the cases of rape, incest, or when necessary to save the life of the mother.

### **Coverage Mandates Still in Place**

As previously noted, the budget reconciliation process is limited to provisions impacting taxes and spending. As a result, the AHCA cannot repeal ACA coverage mandates for group health plans, including:

- The requirement to provide coverage to dependent children up to age 26
- The restrictions on pre-existing condition exclusions
- The prohibition on recessions of coverage
- The prohibition on excessive waiting periods (90-day rule)
- The requirement to provide no cost preventive care
- Limits on maximum out of pocket costs for participants
- The prohibition on annual and lifetime dollar limits on “essential health benefits”
- Enhanced claims and appeals procedures requiring review by independent review organizations (IROs)

### **Conclusion**

The AHCA is unlikely to reach the Senate in its current form. If it remains substantially similar in form and content, point of order challenges are likely and its passage is uncertain. We will continue to monitor developments as the AHCA proceeds through the legislative process.

### **Compliance Update is presented by the Compliance Practice Group of Alliant Employee Benefits**

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