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Key Legislative Developments Affecting Your Human Resources US

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House Passes AHCA; Funding Secured for Gov't and Coal Miners' Health Benefits; News on DOL Rules

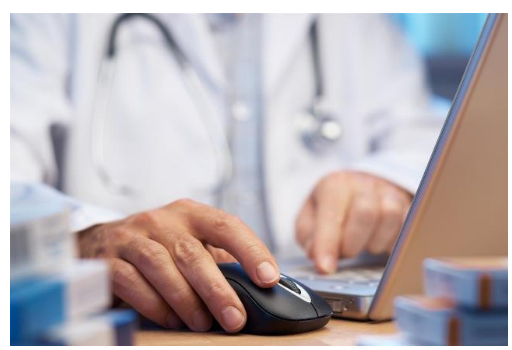
Last week, the House passed the American Health Care Act, legislation that would leave intact some pillars of the Affordable Care Act while stripping away others and enhancing health savings accounts. President Trump signed legislation funding the federal government through September 30, all but ensuring that the weeks following the August congressional recess will focus on averting a shutdown. He also is expected to sign legislation that jettisons DOL rules for state-run savings plans.

Omnibus Funding (Miners' Health Benefits)

Funding for fiscal year 2017, which ends on September 30, and permanent funding for retired coal miners' health benefits were secured when President Trump signed the Consolidated Appropriations Act, 2017 (H.R. 244), last week. For additional information on the omnibus bill, please see our May 1 *Legislate* and this press release.

Health Care Reform

By a vote of 217 to 213, House GOP lawmakers advanced the American Health Care Act (AHCA) (H.R. 1628) to the Senate for consideration. Designed to unravel significant portions of the Affordable Care Act (ACA), the legislation includes amendments that were needed to garner votes from Republicans whose earlier vows to vote against it threatened its passage. (For background on earlier efforts to pass the AHCA, please see our *Legislate* from March 27 and our *FYI Alert* from March 8*.*



Repeal Provisions

The AHCA would repeal many of the ACA's tax-related provisions, effective as of 2017 (except as otherwise noted) including:

- Penalties associated with the individual and employer mandates (effective for 2016), but not the employer shared responsilbity provisions
- Medical device tax, the pharmaceutical manufacturer tax, and the health insurer tax
- Exclusion of over-the-counter medications obtained without a prescription from the definition of qualified medical expenses
- Annual cap on salary reduction contributions to health flexible spending arrangements (health FSAs)
- Additional 0.9% Medicare tax on high earners (effective in 2023)
- The 3.8% tax on net investment income
- Increase in the income threshold for the medical expense deduction from 7.5% to 10% (the AHCA would further reduce the threshold to 5.8%)
- Elimination of the deduction for expenses allocable to the Medicare Part D retiree drug subsidy

Here's what the AHCA doesn't do.

Notably absent from the AHCA is permanent relief from the Cadillac tax. It is currently delayed to 2020 and would be delayed to 2026 by the AHCA. However, given the bipartisan support for a full repeal of this 40% excise tax on high-cost plans, lawmakers could consider sweeping it away before it would otherwise be effective. Likewise, they may revisit whether to cap the currently unlimited tax exclusion on employer-provided health coverage. The AHCA also does not eliminate employer shared responsibility reporting requirements (IRS Forms 1094 and 1095). However, as the AHCA would repeal the ACA's employer and individual shared responsibility mandates, the forms likely will be modified/simplified.

Health Savings Accounts

Among other things, the AHCA would dramatically expand health savings accounts (HSAs), beginning in 2018, by:

- Increasing (almost doubling) the permitted maximum monthly contribution and aligning the statutory annual deductible and out-of-pocket expense limitation (commonly referred to as the annual out-of-pocket limit)
- Permitting HSA funds to be used for additional expenses, including over-the-counter medications obtained without a prescription and other qualified expenses incurred while the individual is covered under a qualified HDHP, but within 60 days of establishing an HSA

Effective in 2017, the legislation would also reduce the penalty, from 20% to 10% (i.e., pre-ACA penalty) for non-qualified HSA distributions.

> **Comment.** The HSA expansions contemplated by the AHCA might foster new and innovative strategies to help reduce health care spend; improve the health, total wellbeing (including financial and retirement-readiness) and productivity of employees (as well as their families); and to leverage better available tools and programs (such as those that focus on finding services focused on transparency, cost and quality).

Other Provisions

Some AHCA provisions could have a meaningful, albeit indirect, impact on employers. For example, states would be permitted to:

- Modify the services included as essential health benefits (EHBs) in individual and small group policies, starting in 2020. (For background on EHBs, please see our November 2, 2016 *For Your Information*.)
- Base rates on individuals' health status, beginning in 2019, and to increase the current age banding above 5:1, beginning in 2018 (the ACA allows up to 3:1)

For additional information on the AHCA, please see our May 4 and March 8 issues of *FYI Alert*.

Next Steps for AHCA

The Senate will take up the AHCA, but they will not sprint to the finish line. To pass this legislation inside the reconciliation budget process, which has a 51 vote rather than the 60 vote threshold, the Senate must adhere to strict procedural rules. Among other things, the provisions of the bill must relate to revenue and taxation (the Byrd rule), and the cost of the bill must satisfy budget reconciliation instructions.

The first step will be for the Congressional Budget Office (CBO) to analyze the bill as passed by the House and to issue a report. As this is a complex analysis, based on numerous factors including what provisions of the bill are likely to remain and which ones could be jettisoned, the report is not expected to be expedited. Hopefully, it will be issued in time for the Senate to consider the bill, the Senate and House to resolve any differences, and the president to sign it no later than September 30, the last day of the 2017 fiscal year.

> **Comment.** With both chambers of Congress on recess for the month of August, and the need to secure government funding for the 2018 fiscal year (that begins on October 1, 2017), there will be little wiggle room in terms of timing. Additionally, not only is the congressional calendar unforgiving, the restrictions created by the Byrd rule are likely to cause the Senate to eliminate many provisions (such as the those that would relax the rules for pre-existing conditions and essential health benefits) that were needed to garner House GOP lawmakers' support. Indeed, the Senate may start from scratch, with a bill that incorporates some AHCA provisions as passed by the House. Nevertheless, it remains to be seen whether Senate and House lawmakers will successfully hammer out a final bill that would pass the full Congress even with the lower voting thresholds.

Pre-existing Health Conditions

The AHCA includes protections for people with pre-existing health conditions. But, states could apply for waivers that would allow insurers in the individual and small group markets to charge higher premiums for certain individuals with pre-existing conditions. The AHCA also includes funding to help support state high-risk pools.

Retirement Reform

Congress continues to focus on DOL rules that would affect employer-sponsored retirement plans.

Government Run Programs

Having disapproved DOL's rule for cities and counties to require employer participation in ERISA-exempt, government-run payroll deduction savings program back in April, last week the Senate agreed to a House resolution to disapprove DOL's regulation supporting state-run retirement savings plans. President Trump is expected to sign the legislation shortly. For additional background on both DOL rules, please see our issues of *For Your Information* from January 5, 2017 and August 29, 2016. For more on the state disapproval and possible next steps, see our May 5 *For Your Information*.

Comment. Notwithstanding the possibility of an ERISA challenge, some states, cities and counties assert they will still move forward with IRA programs that would have complied with the now defunct DOL rule.

Fiduciary Rule

Last week, a House Financial Services Committee approved the Financial CHOICE Act (H.R. 10), legislation that would repeal the DOL fiduciary rule, allow the SEC to take the lead on issuing one, and require DOL guidance to align with the SEC. For additional background, please see our May 1 *Legislate*.

Looking Ahead

With the House on recess this week, the focus will be on the Senate and the aftermath of the House passing the AHCA.

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