CONDUENT

Legislate®
Key Legislative Developments Affecting Your Human Resources US

Volume 8 | Issue 25 | June 26, 2017

Senate Health Care Reform Bill – Out from the Shadows

Last week, after being shrouded in secrecy, the Senate released a discussion draft – not final legislative language – of a health care reform bill that for employer plans strikes a slightly different balance than the one passed by the House on May 4. With no backing expected from Democrats, advancement in the Senate will depend on whether the Republican leadership can successfully whip up sufficient support from the different GOP factions.

In this issue: The Better Care Reconciliation Act of 2017 | Employer Mandate | Individual Mandate | Taxes | Account-Based Plans | Insurance Market Protections | Cost-Sharing Reduction Payments | What's Next?

Background

Republican lawmakers have introduced numerous health care reform bills during the current Congress. To date, none have garnished unwavering or universal support from GOP members. Nevertheless, the party's leadership has charged forward hoping to fulfill a campaign promise to repeal and replace the Affordable Care Act (ACA).

Last month, following much handwringing, the House voted on a bill – the American Health Care Act, or AHCA (H.R. 1628). As every House Democrat and some House Republicans voted against it, the bill passed by a slim margin with the final count of 217 to 213. For background on the AHCA, please see our May 8 *Legislate*.

Last week, the Senate unmasked a "discussion draft" of its legislative health care reform proposal – the Better Care Reconciliation Act of 2017 (BCRA). A section summary can be found here. If enacted in its current form, the BCRA, like the AHCA, could bring about significant changes for employer-sponsored health care plans. However, neither proposal would fully repeal and replace the ACA.

Better Care Reconciliation Act of 2017

Fundamental differences between the Senate BCRA draft and the House-passed AHCA relate primarily to those portions of the health care ecosystem that indirectly affect employers, such as Medicaid and Medicare matters. However, both proposals address other key matters squarely within employers' radar. Key elements of interest for employers are discussed below.

Employer Mandate

Although neither chamber proposes to fully repeal the employer mandate, in their current forms, effective for 2016, both the BCRA and the AHCA would reduce to $0 the penalty that employers face under the ACA for failing to comply with its coverage, affordability, minimum value and minimum essential coverage requirements. (For background, please see our June 2 *For Your Information*.) In other words, there would be no teeth left to the employer mandate. Nevertheless, the employer reporting obligations that relate to the offer of coverage to employees would remain – at least in the near future. Specifically, the reporting required by Internal Revenue Code Sections 6055 and 6056 (i.e., Forms 1094 and 1095), would not be eliminated in either the Senate and House proposals.

BCRA vs. AHCA

The Senate proposal is technically crafted as an amendment to the House version of the AHCA. And, although the BCRA discussion draft is structured as a complete replacement of the House bill, many of the provisions are the same in both proposals.

Individual Mandate

As currently drafted, effective for 2016, both the BCRA and the AHCA would reduce the penalty to $0 for individuals who fail to satisfy the ACA coverage mandate. However, unlike the House, the Senate proposal does not include a continuous health insurance coverage incentive. Specifically, the AHCA imposes a 30% late enrollment surcharge (applicable to the health plan premium for up to 12 months) for those who go without coverage for more than 63 days.

> **Comment.** The elimination of the individual mandate and the lack of any requirement for maintaining continuous coverage under the BCRA raise concerns about the stability of the ACA marketplaces and adverse selection.

Taxes

The House and Senate take a similar approach on tax matters. Specifically, both the BCRA and the AHCA would repeal numerous ACA taxes, including the medical device tax, tax on branded prescription drugs, as well as the 0.9% Medicare increase and the 3.8% tax on net investment income (both of which are applicable to high-wage earners). Additionally, under both proposals, there would be a delay (from 2020 to 2026) of the 40% excise tax on high-value employer-sponsored health plans (the so-called Cadillac tax).

> **Comment.** Neither the BCRA nor the AHCA reflect a proposal to cap the tax-favored treatment of employer-provided health care. Nevertheless, the issue could come up as the legislative proposals move forward or as the GOP seeks to advance its broad-based tax reform agenda and looks for ways to raise revenue.

Account-Based Plans

The BCRA and AHCA proposals address health flexible spending arrangements (FSAs) and health savings accounts (HSAs), both of which permit pre-tax contributions to be made and funds to be used on a tax-favored basis. (For additional background, please see our January 5, 2015 *FYI In-Depth*.)

For health FSAs, both chambers would eliminate the cap on salary reduction contributions and permit funds to be used for over-the-counter (OTC) medications without a prescription.

Both proposals would support tremendous expansion of HSAs. Among other things, the BCRA and the AHCA would:

- Significantly increase (almost double) the permitted maximum monthly contribution limits
- Permit the funds to be used for additional expenses, including for OTC medications without a prescription and, subject to certain requirements, for qualified expenses incurred prior to establishing an HSA
- Reduce the penalty from 20% to 10% for non-qualified HSA distributions
- Permit married individuals 55 and older to each contribute the $1,000 catch-up contributions to the same HSA

Insurance Market Protections

The ACA implemented several insurance market reforms designed to protect individuals. As noted below, although the BCRA and AHCA address them, they may do so differently.

Pre-existing Conditions

The ACA includes a strict prohibition on charging individuals with pre-existing conditions higher premiums. Unlike the AHCA, the BCRA would keep the protection. Under the AHCA, states would be permitted to 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.

Adult Children

Neither the House nor the Senate proposes to remove the ACA protection for adult children up to age 26 to remain on their parents' plans.

EHBs and Dollar Limits

Both chambers have proposed modifying the ACA rules that require benefit coverage for 10 broad categories known as essential health benefits (EHBs). Specifically, they would permit states to apply for a waiver from the EHB requirement. It's possible this might impact employer-provided plans and the application of annual and lifetime dollar limits to EHBs (currently prohibited by the ACA), but, at this time, it's not clear.

For more on BCRA, including a full list of the ACA taxes that would be repealed and provisions relating to Medicaid and Medicare, please see this **section-by-section summary.**

Cost-Sharing Reduction Payments

In an effort to stabilize the individual market, the Senate proposal includes a commitment to make cost-sharing reduction (CSR) payments for a period through 2019. The BCRA specifically calls for appropriation of funding from the federal treasury for this purpose. Currently, the matter of funding is the subject of a litigation brought by the House. (For background, please see our April 17 *Legislate*.)

Comment. Although CSR payments are designed to strengthen the individual market by requiring insurers to reduce costs for certain low-income enrollees, if they stop, it may threaten the continued viability of the individual insurance markets and in turn have an indirect adverse impact on employers. On the one hand, if employees ineligible for employer-provided coverage have no viable non-employer option, they might go without insurance. In such case, this may not bode well for either the individual or the employer, as productivity in the workplace relies on having a healthy workforce. On the other hand, if such employees enroll in an employer plan (perhaps because the eligibility provisions are broadened), it might transfer costs currently borne by the individual market to the employer.

What's Next?

The Senate proposal will be reviewed by stakeholders and scored by the Congressional Budget Office (CBO). Senators are likely to offer numerous amendments, some of which may be approved and incorporated into a final draft before it's scheduled for a vote. As to when that may occur, the Senate Republican leadership is aiming for this week, before the one-week July 4 recess. The timing will depend in part on whether the Senate GOP can whip up enough votes in support of the bill. Although only 50 votes would be needed (with Vice President Mike Pence breaking a 50-50 tie) and there are 52 Senate Republicans, some senators have already suggested that they may not get on board for various reasons, including that the proposal does not fully repeal the ACA. (For information on the budget reconciliation process, which could allow health care reform to pass the Senate with a simple majority rather than 60 votes, please see the January 4, 2017 Congressional Research Service report.) Additionally, if the CBO report is unfavorable, or the Senate parliamentarian determines that one or more provisions in the proposal must be removed to allow it to advance under the reconciliation process (with a simple majority vote), the timing for a Senate vote may be delayed to sometime in July or later.

Authors
Allison R. Klausner, JD
Sharon Cohen, JD

Produced by the Knowledge Resource Center of Conduent Human Resource Services
The Knowledge Resource Center is responsible for national multi-practice compliance consulting, analysis and publications, government relations, research, surveys, training, and knowledge management. For more information, please contact your account executive or email fyi@conduent.com.