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Senate Focuses on Health Care Reform; House Committee Considers DOL Fiduciary Rule

The Senate's upcoming August recess has been delayed and shortened to give Republican lawmakers more time to rally around a proposal to repeal and replace the Affordable Care Act and to advance its legislative agenda. Meanwhile, a legislative proposal to unwind the Obama-era fiduciary rule was vetted by a House committee.

Better Care Reconciliation Act of 2017 Redux

Late last week, the Senate released a revised version of the Better Care Reconciliation Act (BCRA), as well as a summary of the proposal. The original BCRA was introduced June 22, but never made it to the floor of the Senate for a vote. (See our July 10 and June 26 issues of *Legislate*.) The revised BCRA includes changes that the Senate Republican leadership hopes will garner the needed votes to pass the legislation. This includes a proposal by Senator Ted Cruz, R-Texas, effective in 2020, that would allow insurers to offer plans that do not comply with all the ACA requirements as long as the insurer offers plans that satisfy ACA requirements.

While the bill includes some important changes for individual coverage offered through the ACA marketplaces and Medicaid, most of the provisions that directly impact employers are similar to the original BCRA proposal.

BCRA vs. AHCA

The Senate's BCRA is technically crafted as an amendment to and replacement of the House's American Health Care Act (AHCA). However, many of the provisions are the same in both proposals. For background on the AHCA, which was passed by the House on May 4, please see our **May 8** *Legislate*.

Employer and Individual Mandates

Similar to the prior proposal, the revised BCRA would effectively repeal the employer and individual mandates, retroactive to 2016, by reducing to $0 the penalty that employers and individuals would face under the ACA for failing to comply with its coverage requirements. But the employer reporting requirements that relate to the offer of coverage to employees would remain – at least for the near future. Specifically, the reporting required by Internal Revenue Code Sections 6055 and 6056 would not be eliminated.

> **Comment**. Since the current ACA premium subsidies would largely remain in place through 2019, many of the current ACA reporting requirements would likely need to continue through 2019 for the IRS to enforce eligibility for the premium subsidies. And even in 2020 and later, some type of employer reporting would be required to help enforce eligibility for the revised premium subsidies. However, the IRS could simplify some of the reporting requirements with IRS forms 1094 and 1095, especially with the elimination of the individual and employer mandate penalties.

To replace the individual mandate, starting in 2019, the BCRA would impose a six-month waiting period in the ACA marketplace for individuals who have a break in coverage of 63 days or more in a twelve-month period.

Taxes

The BCRA would repeal most of the ACA taxes, including the taxes on medical devices, branded prescription drugs and insurers. The BCRA would delay, but not repeal, the 40% excise tax on high-value, employer-sponsored health plans (the so-called Cadillac tax) from 2020 to 2026. However, unlike the prior proposal, the revised BCRA would retain the 0.9% Medicare tax increase and the 3.8% tax on net investment income, both of which are applicable to high-wage earners.

Health FSAs and HSAs

The revised BCRA includes the health flexible spending arrangements (FSAs) and health savings accounts (HSAs) provisions included in the prior proposal, but also includes some additional HSA provisions.

For health FSAs, starting in 2018, the revised BCRA would eliminate the $2,500 (indexed) cap on salary-reduction contributions and permit FSA funds to be used for over-the-counter (OTC) medications without a prescription.

The BCRA has numerous provisions that would greatly enhance the value of HSAs, the first two of which are new to the revised proposal:

- Permit HSAs to reimburse eligible expenses for children through end of the year the child reaches age 26
- Permit HSAs to reimburse premiums paid for an individual high-deductible health plan (HDHP)
- Significantly increase (almost double) the permitted maximum monthly contribution limits
- Permit HSA funds to be used for additional expenses, including for OTC medications without a prescription and, subject to certain requirements, qualified expenses incurred prior to establishing an HSA
- Reduce the penalty from 20% to 10% for nonqualified HSA distributions
- Permit married individuals 55 and older to each contribute the $1,000 catch-up contributions to the same HSA

These HSA changes would generally start in 2018, with the exception of the OTC and nonqualified expense penalty changes, which would be effective in 2017.

What's Next?

The Congressional Budget Office (CBO) is expected to release its report on the bill early this week. The CBO's estimate of the number of consumers who would lose health care coverage and the budget impact will have a significant impact on the BCRA's prospects for passage in the Senate, and even on it being introduced on the Senate floor for a vote.

If the BCRA makes it to the Senate floor, there could be extended debate, as well as proposed amendments, before being scheduled for a vote. At this time, no vote is expected until at least next week.

Lawmakers Again Take Aim at Fiduciary Rule

As discussed in our June 12 *Legislate*, multiple congressional volleys have been aimed at replacing the DOL's fiduciary standard. Now, Rep. Ann Wagner (R-Mo.) has floated a draft bill that would repeal the DOL rule on conflicts of interest for investment advice to retirement savers. The bill would replace the DOL regulation with specific requirements for brokers that their recommendations "reflect reasonable diligence, care, skill and prudence." In addition, they would have to disclose at the point of sale their compensation and any material conflict of interest. Responsibility for rulemaking would rest with the SEC rather than DOL.

The draft legislation was discussed at a House Financial Services Committee hearing on July 13 that also examined the impact of the fiduciary rule on capital markets. Concerns were raised at the hearing about litigation risk, shrinkage of available products and services, and the potential for conflicts in mandates on brokers, depending on the account type.

Looking Ahead

With an eye on the calendar, House and Senate leaders will continue efforts to accomplish as many agenda items as possible before the now delayed summer recess. Once they return in September, they will have few days in session and their priority will be to introduce and pass legislation to fund the government for fiscal year 2018 and avert a shutdown after September 30.

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