

# Legislate<sup>®</sup>

## Key Legislative Developments Affecting Your Human Resources US

Volume 8 | Issue 28 | July 24, 2017

### Congress Examines ACA Repeal and Fiduciary Rule

Summertime often brings back memories or dreams of rest and relaxation. However, given the latest Hill activity related to health care reform and the fiduciary rule, lawmakers may not enjoy much of the 2017 summer at all. Indeed, to advance their efforts to dismantle the Affordable Care Act and unwind the DOL fiduciary rule, the GOP leadership may cancel the traditional August recess.

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#### Health Care Reform: Now what?

GOP intraparty discord brought Republicans' ambitious efforts to gut large swaths of the Affordable Care Act (ACA) to a screeching halt. After a number of Republican senators were unwilling to back the [Better Care Reconciliation Act](#) (BCRA), Senate Majority Leader Mitch McConnell, R-Ky., was left with only one choice – not to put the bill up for debate or vote.

But, efforts to reform health care are not over and the House, Senate and the president are striving for a winning strategy they all can agree on. Now, Sen. McConnell is attempting to guide the Senate GOP – during Sen. John McCain's unexpected absence due to health reasons – to move forward with an ACA repeal-only bill. Specifically, he has put forth the [Obamacare Repeal Reconciliation Act of 2017](#) (ORRA), a bill modeled after the [reconciliation package](#) that was vetoed by President Obama in 2016. As such, the ORRA does not include any replacement provisions like those in the House's [American Health Care Act](#) (AHCA) and/or the BCRA. For example, the ORRA would not expand health savings arrangements (HSAs).

#### What's ORRA all about?

Like the BCRA, the ORRA is technically an amendment to and replacement of the House-passed AHCA. For background on the AHCA, please see our [May 8 Legislate](#). For BCRA background, see our [July 17 Legislate](#).

#### Tax-Related Provisions

Among other things, the ORRA would repeal (effective dates noted below) many of the ACA's tax-related provisions (all found in the Internal Revenue Code), including:

- Penalties associated with the individual and employer mandates (retroactive, beginning 2016), but not the employer shared responsibility provisions or the reporting requirements (i.e., IRS Forms 1094 and 1095)

- Medical device tax (effective beginning in 2018)
- Tax on prescription medications, e.g., branded prescription drugs (effective beginning in 2018)
- Health insurance tax (effective beginning in 2018, following the one-year moratorium on the collection of the 2017 tax)
- Exclusion of over-the-counter medications obtained without a prescription from the definition of qualified medical expenses (effective for expenses incurred beginning in 2017)
- Annual cap on salary reduction contributions to health flexible spending arrangements (health FSAs) (effective for plan years beginning in 2018)
- Increase in the income threshold for the medical expense deduction from 7.5% to 10% (but would not, like the AHCA, further reduce the threshold to 5.8%) effective beginning for the 2017 tax year
- Reduction of the HSA penalty from 20% to 10% for non-qualified distributions (effective for distributions beginning in 2017)
- Elimination of the deduction for expenses allocable to the Medicare Part D retiree drug subsidy (effective for tax years beginning in 2017)
- Additional 0.9% Medicare tax on high-wage earners (effective for tax years beginning in 2018)
- The 3.8% tax on net investment income (effective for tax years beginning in 2017)

### Cadillac Tax

Like the AHCA and BCRA, notably absent from the ORRA is permanent relief from the Cadillac tax. It's delayed to 2020 and would be delayed by the ORRA to 2026. However, given the bipartisan support for a full repeal of this 40% excise tax on high-cost plans, lawmakers could repeal it before it would otherwise be effective. Likewise, they may revisit whether to cap the unlimited tax exclusion on employer-provided health coverage.

### Cost-Sharing Reduction Payments

The ORRA also addresses the cost-sharing program. In an effort to stabilize the individual market pending that repeal, the bill would provide cost-sharing reduction (CSR) payments for plan years through 2019 and then revoke the program. The ORRA, like 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 further background on the CSR payments, please see our [June 26 Legislate](#).)

**Comment.** Efforts to pass the ORRA may prove unsuccessful, as a number of Republican senators have already expressed opposition and an unwillingness to commit to a path void of a replacement plan. It's dubious that the GOP can garner the requisite 50 votes – plus one from Vice President Mike Pence to break a 50-50 tie – to pass an ACA repeal-only bill. This may seem nonsensical given that over the past eight years GOP lawmakers voted repeatedly to repeal the ACA and, under the protection of a veto by President Obama, some Democrats joined that effort. But now, with the likelihood of President Trump signing such a bill, which could trigger the collapse of the individual market and the loss of health care

coverage for countless Americans, many Republican lawmakers are reluctant to unite behind the ORRA. Indeed, as per the estimates released by the Congressional Budget Office (CBO) and the staff of the Joint Committee on Taxation (JCT), if the ORRA is enacted, by 2018, the number of uninsured would increase by 17 million. Moreover, according to the CBO, the number of uninsured people relative to the number under the ACA would reach 27 million by 2020 and 32 million by 2026.

### Breaking News: 50 or 60 Senate Votes?

Senate Republicans have banked on passing a comprehensive health care bill that falls squarely within the budget reconciliation rules and needs only 50 votes (plus one from the vice president). However, according to the Senate parliamentarian, some BCRA provisions, including the one that relates to funding CSR payments and also appears in ORRA, violate such rules and either would need to be removed from the bill or require 60 votes (and thus support from Democrats) to survive. For more information, please see this [Senate Budget Committee document](#).

### Fiduciary Rule: Are we done yet?

The fiduciary rule is final, but revisions may be forthcoming. Some lawmakers are not satisfied with how the song was written and continue to rewrite the chorus and pen new verses.

New last week, the House Committee on Education and the Workforce approved the Affordable Retirement Advice for Savers Act ([H.R. 2823](#)), the bill introduced by Rep. Phil Roe, R-Tenn. If enacted, it would repeal the DOL rule, establish a statutory definition of “investment advice” and set new standards for providing information about investment and distribution options for employer-sponsored plans, IRAs and HSAs.

Importantly, as noted in our [June Legislate](#), the bill would minimize unwarranted risk of liability and unnecessary hurdles on providing participants and beneficiaries with meaningful distribution guidance, such as recommendations about whether to roll their plan account assets to another plan or to an IRA. More specifically, under the bill, if certain guidelines are followed, information provided to participants or beneficiaries on factors to consider in deciding whether to elect to receive a distribution from a plan (or an IRA) and whether to roll it to a plan or an IRA would fall outside the definition of a fiduciary recommendation. The legislation would permit employees of the employer or a third-party service provider to avoid being subject to all the traps of the current DOL fiduciary rule when providing examples of different distribution alternatives.

For further information on the House bill, please refer to this [fact sheet](#) and [summary](#).

In addition to the House bill, as previously reported, other congressional efforts aim to derail the fiduciary rule, specifically, a Senate bill – the Affordable Retirement Advice Protection Act ([S. 1321](#)) introduced by Sen. Johnny Isakson, R-Ga., a member of the Senate Committee on Finance. It would establish a new paradigm for investment advice for DC plans, but would not expressly repeal the DOL rule nor create a fiduciary duty for IRAs and HSAs.

For background on this Senate bill, please see this [press release](#).

### Mark Your Calendar

The rule’s effective date was in April 2016, but the rule’s applicability date was delayed. The new fiduciary definition and some limited conditions of the Best Interest Contract Exemption (BICE) were implemented on June 9, 2017, while the remaining requirements are scheduled to go into effect January 1, 2018. For background on the fiduciary rule, please see our [June 12, 2017 Legislate](#) and our [April 6, 2016 FYI Alert](#).

Also, as previously reported, there is a [draft House bill](#) that was discussed earlier this month at a House Financial Services Committee hearing as noted in our [July 17 Legislate](#). The bill would repeal the current DOL rule and replace it with one that would require brokers' recommendations to "reflect reasonable diligence, care, skill and prudence" and would require them to disclose at the point of sale their compensation and any material conflict of interest.

## Summer Recess: Will there be one?

If it were up to President Trump, the lawmakers would work through August without a break to get health care reform done. In the meantime, after this week we will have new clues as to the timing of health care reform and, perhaps, comprehensive tax reform.

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