

Legislate[®]

Key Legislative Developments Affecting Your Human Resources US

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Senate GOP Fails to Advance Health Care Reform

Dismantling the Affordable Care Act is a daunting task and last week Republican Senators struck out as they strived to pass legislation to do so. With a handful of Republicans repeatedly crossing the aisle, no Senate iteration of the House-passed bill – the American Health Care Act – garnered a majority of votes, leaving the future of health care reform in limbo.

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Week in Review

If there was ever a week that called out for a “Week in Review” – last week was it! The GOP fought hard to make progress on their commitment to repeal and replace the Affordable Care Act (ACA). So what happened?

First, there was a procedural vote to begin the debate on various health care bills. Senators were not asked to support or reject any particular health care reform provision. Rather, the vote was necessary for Senators to take action. The result was close, with only 50 of 52 Republican Senators voting in favor of it. But, with Vice President Mike Pence casting a tie-breaking vote, the Senate was ready to move forward.

Second, there was a substantive vote. Senate Majority Leader Mitch McConnell, R-Ky., pitched the [Better Care Reconciliation Act](#) (BCRA), a repeal and replace bill, but it failed to pass with nine Republicans (and all Democrats and Independents) voting against it. Strike one.

Next, there was a second substantive vote. Sen. McConnell pitched the [Obamacare Reconciliation Repeal Act](#) (ORRA), a repeal-only bill. Like the comprehensive BCRA, the ORRA failed to pass with seven Republicans (and all Democrats and Independents) opposed to the bill. Strike two.

Finally, there was a third substantive vote on the [Health Care Freedom Act](#) (HCFA), a bill referred to as a “skinny” bill. Among other things, the HCFA would have eliminated the individual and employer mandate penalties (the latter only through 2024), continued the moratorium on the medical device tax (through 2020), and increased the



maximum contribution limit to health savings accounts (through 2020). Like the BCRA and ORRA, the HCFA failed to pass the Senate – with three Republicans, including Sen. John McCain, R-Ariz., (and all Democrats and Independents) voting against it. Strike three.

See our past issues of *Legislate* for background on the following bills: [May 8](#) for the [American Health Care Act](#); [July 17](#) and [June 26](#) for the BCRA; and [July 24](#) for the ORRA.

What's next?

With health care reform legislation passed by the House, but not the Senate, lawmakers and the Trump administration will review their legislative, regulatory and judicial options.

In Congress, lawmakers might follow Sen. John McCain's advice and engage in a bipartisan legislative process that includes hearings, "input from both sides of aisle, [and] heed[s] the recommendations of nation's governors." Democrats are open to working on bipartisan legislation. This would comport well with Sen. Chuck Schumer's, D-N.Y., plea on the Senate floor last month and his comments shortly after the GOP failed to pass any of their three proposals. In the first instance, he asked his Republican colleagues to "turn over a new leaf" and in the second, he spoke of his desire to have Republicans and Democrats "turn the page and work together to improve our health care system."

Comment. Sen. McCain (and perhaps other Republican lawmakers) appears poised to move forward without trying to shoehorn a health care reform bill into the relatively inflexible budget reconciliation rules. By doing so, a health care reform bill could advance without the content being limited to changes that affect mandatory spending, revenues or the federal debt limit. On the other hand, as it would require the bill to meet a 60-vote threshold, some Democrats would need to sign on as well.

For the Congress and the Trump administration, the focus likely will shift to funding (or not) the cost-sharing reduction (CSR) payments. The issue is whether funding the CSR payments will continue as they are a necessary pillar of the current ACA paradigm and are at risk. These payments are currently the subject of litigation – initiated by House Republicans during the Obama administration. A federal lower court determined that funding for CSR payments is being made without congressional authorization. Although the lower court's order was stayed pending appeal (and is not being implemented at this time), the Secretary of HHS (e.g., Trump administration) may decide to forgo an appeal and allow the decision to stand. In such case, the individual market could collapse. This may be what President Trump is referring to when he says that the ACA will "implode." It's possible that costs could shift to large employers or that while the foundation of the ACA fails, employer mandates and responsibilities will remain.

The Trump administration may take (or stop taking) other actions that could further jeopardize the health care ecosystem and hasten the demise of the ACA. Priorities of the regulatory agencies related to the ACA could be shifted. Enforcement of the individual and employer mandates could slacken, and allocation of resources (both people and dollars) to matters such as the website and call centers designed to strengthen the ACA could be reduced or eliminated.

For more background on CSR payments, please see our [July 24, 2017](#) and [May 16, 2016](#) issues of *Legislate*.

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