



## HEALTH REFORM ADVISORY PRACTICE

Alert



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March 7, 2017

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### **GOP Unwraps ACA Repeal & Replace, Some Good News, But a Long Way to Go**

House Republicans late yesterday finally pulled the wrapper off their long-anticipated Affordable Care Act (ACA) repeal and replace bill. The bill is titled the American Health Care Act (AHCA) and would repeal the ACA's individual and employer mandate penalties, further delay (but not repeal) the ACA's Cadillac tax on high-value health insurance, and install a refundable tax credit structure to replace, after 2019, the ACA's tax credits for the purchase of coverage in the individual health insurance market.

Significantly, the bill, as currently written, does *not* include any change in the nontaxable treatment of employer-provided health insurance. Earlier drafts of the bill would have imposed income and payroll taxes on employees (and payroll taxes on the employer) if the premium value of the employee's health insurance coverage exceeded certain thresholds.

**Lockton comment:** Lockton, individually and in conjunction with the American Benefits Council, the Alliance to Fight the 40/Don't Tax My Healthcare, and the Council of Insurance Agents and Brokers, fought hard to convince Congress not to tax workers, their families and employers on the value of their health insurance plans. Lockton officers spent considerable time on Capitol Hill in recent weeks educating members of Congress and their staffs on group insurance principles. Lockton Chairman David Lockton, and Tim Noonan, President of Lockton's Los Angeles operations, met personally with House Majority Leader Kevin McCarthy to express their concerns.

We celebrate the fact the tax did not make it into the draft of the bill unveiled this week, but we will continue to fight against adding the tax as the legislative process continues.

A long and potentially torturous road lies ahead for the bill. Pieces of it will move through a mark-up process tomorrow in both the House Ways and Means and Energy and Commerce Committees. It will then arrive at the House's Budget Committee, where the two pieces will be assembled. We expect the bill, as marked up and amended this week, to reach the floor of the House for a vote by the end of March. If it passes, the Senate then gets its bite at the proposed legislation.

## Unwinding the Affordable Care Act

The bill, if it were to be enacted substantially in its current form, would make the following changes to the ACA:

- Repeal the individual and employer mandate penalties, and do so *retroactively* for 2016 and later years, **but not 2015**.

**Lockton comment:** While employer *reporting* under the ACA will not be repealed, it will be replaced, apparently after 2019, by simplified reporting on the Form W-2. See the discussion below regarding the availability of tax credits to purchase individual coverage.

The fact that the employer mandate would not be repealed for 2015 means there might still be some risk for employers that failed the mandate or neglected to provide employer reporting for the 2015 year. But it's also possible the Trump administration will not work too hard to actually enforce the mandate for that year. Why not repeal it for 2015 as well? By leaving the mandate in place for 2015, the GOP can "capture," for scoring the cost of the bill, the tax revenue the mandate was expected to generate for 2015.

- Replace the ACA's tax credits, for purchase of individual market coverage, with a different system of refundable tax credits, for years beginning after 2019. Tax credits mostly identical to those provided by the ACA would remain available for 2018 and 2019. The bill would adjust the credits based on age, whereas the ACA looks solely at household income.

Beginning in 2020, the GOP's tax credits are age weighted (between \$2,000 and \$4,000, with a cap of \$14,000 per family), and do not even begin phasing out until the individual's annual income exceeds \$75,000 (twice that amount for joint filers). These phase-out thresholds are substantially higher than under the ACA.

**Lockton comment:** Until 2020, it appears existing ACA reporting might still be required to allow the IRS to determine whether anyone who received ACA tax credits to purchase individual market coverage was actually ineligible to receive the credits due to an employer's offer of coverage. The Trump administration could make the reporting less burdensome, in light of the elimination of the employer mandate. For example, without an employer mandate, there would be no need to identify whether an employee was full-time under the cumbersome ACA lookback measurement method.

The new tax credits for the purchase of individual market coverage would not be available to anyone who receives an offer of employment-based coverage. Interestingly, there would be no requirement that the employer's coverage be of any particular actuarial value, or be offered at a particular price point, in order to be disqualifying.

*Any* coverage more robust than flexible spending accounts (FSAs), on-site clinics, or dental or vision plans would disqualify the individual from credits. Health

reimbursement arrangements (HRAs) would be disqualifying, although small employer HRAs used to reimburse individual market premiums would not. However, the employer contribution would be an offset to any tax credits.

Because the IRS would need to know who received offers of employment-based coverage, the GOP bill would install two new reporting obligations on employers. Annually, employers would indicate on the W-2 whether the employee was offered health insurance.

In addition, the bill provides that credits can be claimed in advance (similar to the ACA), so whenever an employee or family member were to seek advance tax credits to purchase individual market coverage, the employee would need to obtain from his or her employer – and if the employer were asked, it would have to provide the employee – a written statement reflecting whether the employer offered coverage to the individual seeking the tax credits.

***Lockton comment:*** Regulations would prescribe a method for these certifications. Ideally, they could be done electronically to minimize the burden on employers.

- Repeal the ACA's limit on FSA benefits (the ACA limited FSA benefits to \$2,500 per plan year, adjusting the limit for inflation). This change would be effective for 2018 and later years.
- Permit FSAs, HRAs and health savings accounts (HSAs) to reimburse the cost of over-the-counter medications on a tax-free basis, beginning in 2018.
- Turbocharge HSAs by increasing the maximum contribution to an amount equal to the annual out-of-pocket maximum under the related high deductible health plan, and allowing both spouses to make catch-up contributions to a single HSA. These changes would be effective for 2018 and later years.
- Reduce from 20 percent to 10 percent the penalty tax on HSA distributions for reimbursement of non-qualifying expenses (also for the 2018 and later years).
- Repeal a variety of other ACA taxes, including the taxes on health insurance companies, medical devices and pharmaceutical manufacturers, the additional 0.9 percent Medicare tax on high-wage earners, and the 3.8 percent additional tax on investment gains, all for years beginning after 2017.
- Defer the ACA's 40 percent Cadillac tax on high value health plans to 2025.
- Continue the ACA's Medicaid expansion until 2020 for those states that expanded eligibility under their Medicaid programs. Until that time, the federal government would continue to fund 90 percent of the cost on behalf of individuals who enrolled under the expanded program (the expanded funding would continue after 2019 for many who were enrolled by the end of that year, as long as they remain covered without a month or longer break).

After 2019, the federal government's method for funding Medicaid would change. States would receive a set amount for each person eligible for the state's program, and the state would manage how it wants to spend those dollars. Any healthcare costs above the set amount would be borne by the states. The set amount would increase annually according to a formula tied to overall healthcare costs.

***Lockton comment:*** States would receive different amounts for different populations. For example, they would receive more money for blind and disabled persons.

## **What Now?**

There's no guarantee the bill unveiled yesterday can survive a vote in the House, much less the Senate. Conservatives in the House and Senate view the new tax credits as unacceptable entitlements. Some Senate Republicans have expressed a refusal to vote for a change in Medicaid structure. Some see the House version as effectively defunding Planned Parenthood, something other Republican senators have said they cannot accept.

And repealing nearly all the ACA taxes begs the question: How do we pay for all this? The Congressional Budget Office has not scored the bill and might not have a score before the bill comes to a vote. The Congress's Joint Committee on Taxation has estimated that revenue losses tied to most of the tax-related provisions in the bill would amount to more than a quarter of a trillion dollars over 10 years.

All we know today is that the legislative sausage-making has begun in earnest. We were pleased that some troubling provisions Congress had talked about quite earnestly do not appear in the bill, but there's still a long way to go. As this *Alert* went to press, Sen. Roy Blunt (R-MO) said he doubted the bill in its current form could pass the Senate, but "the nucleus of the plan is clearly there, and the president says it's negotiable and so do House members."

This Congress also has on its aggressive agenda a complete overhaul of the federal tax code. Some troubling features that do not appear in the repeal and replace legislation might resurface as part of comprehensive tax reform later this year or next. So we shall see.

***Edward Fensholt, J.D.***  
***Director, Lockton Compliance Services***

### **Congress and a Tax on Health Insurance**

Congress has seriously considered taxing employees (income and payroll tax) and employers (payroll tax) on a portion of their group health plan values. If you are opposed to such action, click here for **model text** you might consider sending to your representative and senators.

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