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Senate Unveils its Repeal-and-Replace Bill; Political Obstacles to Passage Remain

Senate Republicans this week unveiled a discussion draft of their modifications to the House of Representatives' American Health Care Act, the Affordable Care Act (ACA) repeal-and-replace bill passed by the House six weeks ago. As anticipated, and as we've reported in recent weeks, the Senate version is substantially similar to the House bill, with differences centering on individual health insurance market issues, tax credits to purchase that coverage, and Medicaid reform.

Lockton comment: The Senate bill also has a different name: the Better Care Reconciliation Act of 2017 (BCRA).

Of interest to the nation's employers, the Senate bill:

- Retains the House bill's elimination of penalties under the ACA's employer and individual mandates, retroactively to January 1, 2016.
- Repeals taxes on health insurers, medical device manufacturers and prescription drug makers, taxes which have indirectly increased the cost of group health insurance coverage. It also repeals the ACA's additional Medicare and capital gains taxes on higher wage earners.
- Repeals the ACA's cap on health flexible spending account benefits for years after 2017, and the prohibition on tax-free reimbursement of over-the-counter medicines for years after 2016.
- Defers the ACA's widely-reviled 40 percent "Cadillac tax" on health plans from 2020 to 2026.
- Turbocharges health savings accounts (HSAs) by substantially increasing the maximum annual contribution and eliminating some ACA-imposed restrictions and tax increases on HSA distributions.
- Does *not* change the current tax-favored treatment of employer-provided health coverage, although such a change was under serious discussion by Senate Republicans as recently as three weeks ago and remains a threat to resurface later this year or next, as part of the GOP's tax reform effort.

Of interest to those using federal tax credits to purchase individual health insurance coverage, the Senate bill leaves ACA subsidies largely in place through 2019 and makes two significant changes beginning in 2020:

- First, the BCRA modifies the ACA's means-tested eligibility window by offering tax credits for the purchase of insurance coverage in the individual market to those with household incomes between 0-350 percent of the poverty level. The ACA provides subsidies to those with household incomes from 138-400 percent of the federal poverty level, relying on Medicaid expansion to provide coverage for those at lower income levels. The BCRA would roll back Medicaid expansion, thus the need for some form of federal assistance for those with household incomes in the corridor between 0-138 percent of the poverty level.
- Second, after 2019, tax credits are not available to individuals merely *offered* "minimum essential coverage," without regard to any affordability or minimum value requirement.

Lockton comment: If the BCRA becomes law, the notion that mere eligibility for minimum essential coverage, or MEC, is enough to disqualify an individual from tax credit eligibility after 2019 will cause some employers to re-think their offer of bare-bones MEC coverage, coverage often put into place for years after 2014 to address the ACA's employer mandate requirements. Employers might re-think those offers even prior to 2020, because there won't be an employer mandate penalty to compel them to make such an offer.

Proposed Medicaid Changes

Much of the angst in the Senate's efforts over the last six weeks has focused on how to reign in Medicaid spending without disrupting coverage for those who became eligible for Medicaid under the ACA's expansion of the Medicaid program.

Whereas the House bill would rather quickly roll back the ACA's Medicaid expansion and offer age-weighted tax credits to facilitate the purchase of coverage in the individual market, the Senate version rolls back Medicaid expansion more gradually and substitutes ACA-style tax credits at income levels that would have qualified the purchaser for Medicaid under the ACA. The Senate version calls for the federal government to continue to help states pay for the cost of the ACA's Medicaid expansion over the next seven years.

The Senate is still waiting on a Congressional Budget Office "score" of its bill, a score that it needs before it can vote on the measure. Senate Republican leadership must also grapple with a handful of conservatives – principally Ron Johnson (R-WI), Mike Lee (R-UT), Rand Paul (R-KY) and Ted Cruz (R-TX) – who have already announced their skepticism of the draft bill, viewing it as nothing more than "ACA Light." Senate Majority Leader Mitch McConnell (R-KY) can afford to lose only two Senate Republicans and still pass a bill, assuming the measure will receive no Democrat support. Of course, appeasing the conservative right flank of the GOP caucus could alienate moderate Republican senators who are concerned about the extent of the bill's Medicaid cuts.

Nevertheless, McConnell still hopes to bring the Senate bill to a successful vote next week and send the bill back to the House to approve the Senate's changes. The most optimistic scenario

for proponents of the bill is that the Senate and House quickly pass the revised bill before the July 4 recess. Whether that's likely or even possible remains to be seen.

Lockton comment: Procedurally, both the House and Senate have to pass the same bill before it goes to President Trump's desk for signature. Should the Senate pass the BCRA, the general consensus among Capitol Hill insiders with whom we've spoken is that the legislation will skip a conference committee, where differences in the House and Senate bills would normally be negotiated. Instead, the legislation is expected to go directly to the House floor for an immediate "take-it-or-leave-it" vote. The thought behind that strategy is that if Senate GOP conservatives and moderates can agree on legislative language, then House Republicans should have little problem falling in line.

State Roundup

Last week we wrote about the effort of Nevada's Democrat-controlled legislature to create a sort of "public option" by allowing anyone in the state to buy into the state's Medicaid program. Nevada's Republican governor vetoed the bill.

In Massachusetts – whose own health reform legislation served as a blueprint for the ACA – the governor wants to substantially increase taxes on employers to help fund the Commonwealth's combined Medicaid and CHIP program, known as MassHealth. The governor's budget proposal would increase employers' medical assistance contributions (EMAC) included in their required unemployment insurance contributions by more than 50 percent, from a maximum of \$51 per employee to \$77 per employee. In addition, the proposed budget would levy a new \$750 employer assessment for each employee who declines employer-sponsored health insurance and instead enrolls in MassHealth.

The new taxes would not apply to very small employers, those with fewer than six employees who are exempt from EMAC. The proposal will likely be included in a compromise budget bill next month.

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