THE FEDELI GROUP

2017 HR & Benefits Compliance Alert

House Republicans Pass American Health Care Act; Bill Heads to Senate for Further Consideration

On Thursday, May 4, by a vote of 217 to 213 (with 20 Republicans voting against the bill), the U.S. House of Representatives passed an amended version of the American Health Care Act (AHCA), which repeals and replaces significant portions of the Affordable Care Act (ACA).

This bill comes several weeks after U.S. House of Representatives' Speaker Paul Ryan pulled the AHCA from the floor once it was clear that, at that time, the bill was short on votes to pass. In large part, the original bill failed because the more conservative wing of the Republican Party, known as the Freedom Caucus, was against the bill because of its preservation of certain ACA provisions.

For employers, the most significant change the AHCA makes to the ACA is to repeal the employer mandate penalties effective January 1, 2016. Other significant changes for employers are unlimited flexible spending accounts, and enhancements to health savings accounts (HSAs). [1] For individuals, the most significant changes include the repeal of the ACA's Medicaid expansion and its premium subsidies and cost-sharing reductions for low-income individuals. Higher-income individuals would see relief from various ACA taxes and fees, including the 0.9% Medicare surtax beginning in 2023 and the 3.8% net investment income tax retroactive to the beginning of this year.

The AHCA has been amended several times since its introduction. There are two Manager's amendments (containing Technical and Policy changes), the MacArthur amendment, and the Upton amendment.

The MacArthur amendment establishes a "Federal Invisible Risk-Sharing Program" and allows states to submit applications to the Secretary of Health and Human Services to modify certain ACA requirements, such as the essential health benefits standard and age rating restrictions. States would also be permitted to waive the AHCA's 30 percent premium surcharge for individuals who seek to re-enroll after failing to maintain continuous coverage, defined as a lapse of 63 days or more over the previous 12 months; however, insurers would be able to underwrite based on health status when there has been such a lapse (generally for up to 12 months). For employers, this may mean again having to issue certificates of creditable coverage. The Upton amendment would add an additional $8 billion to state risk pools, which are intended to help individuals with pre-existing conditions obtain coverage in states where community rating is not mandatory.

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[1] Enhancements include an increase in the HSA contribution limits so that they are the same as the out-of-pocket maximums that apply to HSAs (for 2018, $6,650 for self-only coverage and $13,300 for family coverage), allowing the reimbursement of otherwise eligible expenses incurred up to 60 days before an HSA is established, and allowing both spouses to make HSA catch-up contributions to the same HSA. The reduction in the HSA penalty for non-qualified expenses distributions in HSAs was increased to 20% under the ACA; under the AHCA it will go back to 10% retroactive to the beginning of this year.

There was also a companion bill (H.R. 2192) that passed the House along with the AHCA, which eliminates the waiver option in the MacArthur amendment for members of Congress. The bill ensures that members of Congress and their staff are treated the same as other individuals in a state that receives a MacArthur amendment waiver.

Summary of Key Changes

The chart below summarizes some of the significant changes made by the AHCA.

	Affordable Care Act (ACA)	American Health Care Act (AHCA)
Mandates	• Individual mandate • Employer mandate on applicable large employers (ALEs)	• No individual or employer mandate effective retroactive to Jan. 1, 2016 • Insurers can impose a one year 30% surcharge on consumers with a lapse in continuous coverage (individual and small group market)
Assistance	• Income-based subsidies for premiums that limit after-subsidy cost to a percent of income • Cost sharing reductions for out-of-pocket expenses	• Age-based refundable tax credits for premiums, phased out for higher incomes • No cost sharing reductions for out-of-pocket expenses • ACA subsidies phased out after 2019; AHCA credits effective in 2020
Medicaid	• Matching federal funds to states for anyone who qualifies • Expanded eligibility to 138% of poverty level income	• Federal funds granted to states based on a capped, per-capita basis starting in 2020 • States can choose to expand Medicaid eligibility, but would receive less federal support for those additional persons
Premium Age Differences	• 3:1	• 5:1 (and the MacArthur amendment would allow a higher ratio)
Health Savings Account Limits	• $3,400/$6,750	• Contribution limits increased to maximum out-of-pocket limit for HDHP coverage • $6,550/$13,100 (effective retroactively to Jan. 1, 2017)
"Cadillac" Tax	• Cadillac tax on high-cost employer plans implemented in 2020	• Cadillac tax on high-cost employer plans delayed until 2026
Other Taxes	• 3.8% tax on net investment income • Limit placed on contributions to flexible spending accounts • Annual health insurance provider tax • Over-the-counter medication excluded as qualified medical expense • 0.9% Medicare tax on individuals with an income higher than $200,000 or families with an income higher than $250,000	• Repeal of these taxes retroactive to the beginning of 2017 (except for the repeal of the Medicare tax, which would begin in 2023)
Essential Health Benefits	• Individual and small group plans are required to offer ten essential health benefits	• Under the MacArthur amendment, individual and small group plans are required to offer the ten essential health benefits, but a waiver option is available • Some Medicaid plans are not required to offer mental health and substance abuse benefits
No Change: No Pre-Existing Condition Exclusions / Coverage of Children to Age 26 / No Annual or Lifetime Dollar Limits on Essential Benefits		

MacArthur Amendment

The following chart summarizes the changes made to the AHCA by the MacArthur amendment.

Insurance Market Provisions	The MacArthur amendment: • Reinstates Essential Health Benefits (EHB) as the federal standard (removes ability of states to define EHBs, but see waiver option) • Maintains the following provisions of the AHCA: — Prohibition on preexisting condition exclusions — Prohibition on discrimination based on gender — Guaranteed availability and renewability of coverage — Coverage of adult children to age 26 — Community Rating rules (but see waiver option)
Limited Waiver Option	States may obtain waivers from certain federal standards, in the interest of lowering premiums and expanding the number of enrollees. States could seek waivers from: • Essential Health Benefits (states could set their own definition of EHBs for the individual and small group markets starting in 2020, and increase the age rating ratio above 5:1 starting in 2018) • Community rating rules, except for the following categories, which are not waivable: — Gender — Health Status (unless the state has established a high-risk pool or is participating in a federal high risk pool)
Limited Waiver Requirements	States must explain how the waiver will benefit the insurance market in their state, such as reducing average premiums, increasing enrollment, stabilizing premiums for individuals with pre-existing conditions, or increasing the choice of health plans. Applications are automatically approved within 60 days unless denied by HHS.

Limited Waiver Option

The limited waiver option in the MacArthur amendment was necessary to secure the votes of the Freedom Caucus. It has been criticized as potentially allowing states to waive out of the prohibition on pre-existing condition exclusions by allowing underwriting based on health status for those who experience a gap in continuous coverage, which in effect temporarily raises the cost of coverage for individuals with pre-existing conditions. It remains to be seen whether the AHCA's high risk pools and invisible risk-sharing program contain enough funding to offset these potential premium increases.

Next Steps

AHCA has yet to be scored by the Congressional Budget Office. It will now go to the Senate where significant changes are expected in order to secure passage (and it is possible that it may not garner enough votes there to pass at all). In addition, it is not clear that as currently drafted it will meet the requirements to qualify for a simple majority vote under the Senate's budget reconciliation rules. Provisions that have no budgetary impact may be removed and AHCA's tax policies may be required to have sunset dates so that they do not increase deficits outside of the budget window (typically, 10 years). It may take months before any final legislation is passed and the AHCA may get stalled again as changes will have to go back to the House for approval. Employers and other stakeholders should stay the course on ACA compliance at this time while they continue to monitor for changes as the AHCA continues to make its way through the legislative process.

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