# The American Health Care Act: What It Means for Employers and Health Insurers

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After months - or maybe years - of speculation, on March 6 the House Republicans released proposed legislation intended to repeal and replace certain aspects of the Patient Protection and Affordable Care Act, known affectionately as Obamacare or the ACA. The proposal, somewhat generically named the American Health Care Act (AHCA), is trimmed down to fit into the Congressional reconciliation process to avoid a Senate filibuster. As the President tweeted the next day, there is more to come "in phase 2 & 3 of healthcare rollout."

The AHCA proposes some major changes for the individual market and Medicaid, substantial changes in the employer market, and some minor changes to Medicare. Most prominently, the AHCA does away with the most controversial aspects of Obamacare, the individual and employer mandate. It also repeals the cost sharing and income-based premium subsidies available on the Obamacare exchanges, and replaces them with age-based tax credits designed to help individuals pay for coverage.

Almost more notable is what the AHCA does not repeal, presumably due at least in part to use of the reconciliation process. The AHCA does not repeal many of the more popular patient protections, such as the prohibition on pre-existing condition exclusions. It also doesn't repeal many of the market reforms: the guaranteed issue and guaranteed renewal requirements, community rating rules (although there is a loosening of the age rating limitation), essential health benefit rules (other than for Medicaid), or the health insurance exchanges.

## Impact on Employers and Plan Sponsors

The AHCA would have a significant impact on employers and other plan sponsors, but not as negative an impact as initially feared (at least in this phase of the rollout). Below we discuss the AHCA impact on significant prior rules under the ACA, along with some new changes.

### Unchanged (For Now) ACA Requirements

The vast majority of the health plan-related changes adopted by employers and plan sponsors over the past several years continue under the AHCA phase of health care changes. These include:

- Coverage for children until age 26 on their parent's plan
- No lifetime or annual limits on essential health benefits
- New appeal rules (e.g., external review)

- Limits on pre-existing condition exclusions
- No rescission of coverage
- Limits on waiting periods
- First-dollar coverage of preventive care benefits

Note, though, that Health and Human Services Secretary Tom Price has promised that the regulations relating to these rules will all be reviewed. This could lead to changes which cut back on the scope of these regulations (e.g., what is considered "preventive" care or an "essential health benefit").

## Changes to ACA Requirements / Brand-New Concepts

There are significant changes and new concepts in the AHCA which will affect employers and plan sponsors. These are as follows:

**Employer Shared Responsibility ("ESR") Rule.** The ESR Rule's penalty is dropped to $0, from the original $2,000 / $3,000 penalty amounts (which have been modified for inflation). This is very helpful for employers. Many employers set up elaborate systems to track and measure which employees were "full-time," so that those full-time employees could be offered coverage. Under the AHCA, the entire concept of "full-time" under the ESR Rule is eliminated. Moreover, the penalties are retroactively taken away for 2016 and beyond (but remain in place, at least in theory, for 2015).

It appears, however, that an employer would still need to inform the federal government whether an employee received an offer of coverage. This would be greatly simplified reporting accomplished through the Form W-2, rather than the existing Forms 1094 / 1095. This change starts in 2020. So, it is possible that 1094 / 1095 reporting will still be required until then. But it is also possible that the Internal Revenue Service will cut back on the information which must be reported (e.g., the information relating to who is a full-time employee).

**Coordinate with New Tax Credits.** As described further below, the AHCA provides new tax credits in lieu of the ACA's premium tax credits. The new tax credits are not available to anyone who receives an offer of employment-based coverage (even if the employer's plan is rather poor or low-value, apparently). Employers would need to inform employees annually of this offer and also mid-year, upon the request of the employee. So, there will be a new reporting requirement with respect to these tax credits. But the reporting should be more modest than the 1094 / 1095 reporting.

**Over the Counter ("OTC") Reimbursements Return.** AHCA would repeal the ACA's prohibition on health flexible spending accounts ("FSAs"), health reimbursement arrangements ("HRAs") and health savings accounts ("HSAs") reimbursing the cost of OTC medications. The change would be effective in 2018. FSAs also would see their $2,500 limit (adjusted for inflation) removed.

**HSAs Improved.** The maximum HSA contribution would increase to a variable amount - the sum of the plan's annual out-of-pocket maximum plus the amount of the deductible. The basic limit would be $6,550 for self-only coverage and $13,100 for family coverage, but the limits could be higher. The change would be effective in 2018.

Also in 2018, the current 20 percent penalty tax on HSA distributions for non-medical expenses would decrease to 10 percent.

**Cadillac Tax Delayed.** The so-called "Cadillac tax" on high-cost health plans would be delayed until 2025. Also of critical importance is that the AHCA does not cap the tax-free nature of employer-provided health insurance. A prior, leaked drafted had contained a cap on the value of how much could be excluded.

**Tax Credits for COBRA.** The AHCA's tax credits are available not only for individual policies, but also for "unsubsidized" COBRA. It remains to be seen how this will impact employers. For example, must employers begin accepting funds directly from the U.S. Treasury to pay for a former (or current) employee's COBRA premiums? It appears that employers must, at a minimum, "certify" that the COBRA coverage is "unsubsidized" (e.g., there are no employer contributions towards its cost).

## Impact on Health Insurers

In addition to the impact on employers and plan sponsors described above, insurers will be affected by changes to the non-group markets and Medicaid.

**Continuous Coverage Incentive to Replace the Individual Mandate.** Of course, the ACA's individual mandate had the most impact in the non-group market. Without that mandate, Obamacare's ban on pre-existing condition exclusions would naturally lead people to wait until they got sick to get health insurance. This rational behavior would result in much higher, unfair premiums because a smaller base of less healthy people would be paying them. To keep the ban on pre-existing condition exclusions but prevent this market disruption, the AHCA imposes a continuous coverage incentive.

The continuous coverage incentive requires insurers to impose a 30 percent surcharge on health insurance premiums for persons who have had a break in coverage of more than 63 days in the prior year. The surcharge applies for a year, and would begin for special enrollment insureds in benefit year 2018, and to open enrollment insureds for benefit year 2019.

**Age-Based Premium Tax Credits to Replace Income-Based Credits.** Two other main components of the ACA, which put the "affordable" in the title, are the premium tax credits and the cost-sharing reductions, both of which are repealed by the AHCA beginning in 2020:

- The premium tax credit helps eligible people with low or moderate income pay for health insurance purchased through the exchanges. The credit is based on a sliding scale (so it is larger for lower incomes); can be paid directly to the insurer based on an estimate; and is refundable (so it will be paid as a refund even if the credit is more than the amount of the recipient's tax liability).

- Cost-sharing reductions are available to those who purchase silver (third-level) coverage on an exchange - to help pay for deductibles, copayments, and other cost sharing - if their household income is between 100 percent and 400 percent of the federal poverty level (FPL). Presumably, repeal of cost-sharing reductions with enactment of the AHCA would result in dismissal of the House Republicans' lawsuit challenging the funding for the reductions (although the new administration could also presumably just accede to the House Republican position and cease funding these reductions).

The affordability component of the AHCA is also an advanceable, refundable tax credit, but it is mainly based on age instead of income. Thus, the credit is $2,000 per year for a person under age 30, and goes up to $4,000 for a person over age 60, with a cap of $14,000 per family. The credit phases out by $100 for every $1,000 in income over $75,000 ($150,000 for joint filers), but is indexed to the Consumer Price Index.

The ACHA tax credit is available for the purchase of state-approved, major medical health insurance and unsubsidized COBRA coverage by persons who do not have access

to government health insurance programs or an offer of coverage from an employer. The federal government will continue to make eligibility determinations, but insurers and licensed agents will be able to handle more of the consumer-facing work currently performed in 39 states by the federally-facilitated exchanges.

**Metal Levels and Age Variation in Premium Rates.** The AHCA eliminates metal level requirements starting in 2020, so plans will no longer have to achieve specific actuarial value (AV) levels. For now, plans still have to offer essential health benefits and comply with limits on out-of-pocket expenses. Also, the limits on catastrophic plans were not repealed. As AV levels are used to calculate a plan's average risk score for purposes of determining transfers under the ACA's risk adjustment program, it is likely that this will ultimately have an impact on payments and charges under that program.

Although community rating hasn't gone anywhere, the AHCA does increase the variation in premiums plans are allowed to charge adults based on age from 3-to-1 to 5-to-1.

**Health Insurer Taxes.** The ACHA repeals Obamacare's tax on insurers beginning in 2018. Also beginning in 2018, the ACHA repeals Obamacare's $500,000 limit on a health insurer's deduction for compensation to employees.

**Medicaid.** The AHCA makes some big changes to Medicaid. In particular, it proposes moving Medicaid from open-ended federal funding of costs to a capped funding on a per-capita basis (i.e., there would be a cap on the funds that the federal government contributes to states for each Medicaid beneficiary) by 2020.

Other changes include those designed to reduce the overall Medicaid eligible population, either by changing eligibility requirements, limiting state authority to make presumptive eligibility determinations, and incentivizing states to step up eligibility determinations. There is also $10 billion in additional funding (in the form of a "safety net") apportioned to non-expansion states over the next five years.

**Patient and State Stability Fund.** The AHCA creates a "Patient and State Stability Fund" designed to stabilize the individual insurance market. Beginning in 2018 through 2026, states can apply for funds to use for a number of purposes consistent with stabilizing the individual market, including by encouraging reinsurance, providing financial assistance to high-risk individuals or individuals who are high users of health services, and promoting preventive, dental, vision care, and mental health and substance use disorder services.

The fund would be apportioned to states based primarily on a state's relative share of national incurred claims, with consideration for the uninsured population below 100 percent of FPL and the number of insurers in the market. To qualify, states must agree to supply 7 percent of the federal funding beginning in 2020, with the match increasing to 50 percent in 2026. If a state does not apply for funding, the federal government will use the funds apportioned to that state for reinsurance purposes, and the state would be required to supply 10% of the federal funding for 2020, with the state match growing to 50 percent for 2024 through 2026.

**Many Provisions Remain.** Other than as discussed above, the AHCA does not repeal Obamacare's other insurance reforms.

This means that, until further legislative action, plans remain subject to most of the requirements imposed by Obamacare, including:

- Coverage for pre-existing conditions
- Community rating rules
- Limitation on rescissions
- Loss ratio limits
- Guaranteed availability and renewability of coverage
- Essential health benefits,
- Coverage for adult children up to age 26
- Caps on out-of-pocket costs
- No lifetime and annual limits

The exchanges are also not repealed by the AHCA, but they will presumably wither and die after 2020 without the premium tax credit and cost-sharing reductions (which are the main benefits of buying through an exchange). Also, with the elimination of the metal categories and AV levels eliminated after 2020, comparison shopping on the exchanges will likely become more difficult.

## Reception for the AHCA

President Trump supports the AHCA, tweeting that it is "wonderful", which is not surprising given that it addresses most of the principles he outlined in his recent speech to a joint session of Congress. In particular, the AHCA retains the prohibition against discrimination for pre-existing conditions, provides tax credits, encourages HSAs and FSAs, and makes big changes to Medicaid.

While the AHCA does not allow individuals to purchase insurance across state lines - a concept that is still unclear, but one of the points mentioned by the President in his speech - the President tweeted that it will be coming in a later phase of reform. The AHCA also does not impose limits on medical malpractice damages - another point mentioned by the President in his speech - although the House Judiciary Committee approved a separate bill on February 28 that would limit punitive damages in medical malpractice cases to $250,000. In commenting on the AHCA, President Trump also indicated that he was also planning to pursue prescription drug reform, although details on that proposal have not been released.

Despite the President's approval, the bills will likely face challenges from both sides of the aisle. Democrats appear to be uniformly opposed, and the most conservative Republicans are insisting on a much broader repeal of Obamacare. Also, the Congressional Budget Office has yet to evaluate its impact, which will likely impact the conversation.

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