

May 9, 2017

## House Passes American Health Care Act: So Now What?

By [Jason Rothman, J.D.](#)

On May 4, 2017, the House of Representatives narrowly passed the American Health Care Act of 2017 (the AHCA). Action to “repeal and replace” the Affordable Care Act (ACA) was a key item on the Republican agenda after the 2016 election. After months of work, continued pressure from President Trump, and a few late amendments to get enough Republicans to vote yes (exactly zero Democrats voted yes), the House was able to finalize and pass House Bill 1628 in a 217-213 vote.

### Summary of Key Provisions Affecting Employer Sponsored Plans

Before discussing the long-term future of the AHCA, let’s look at some of the key provisions in House Bill 1628 from an employer’s perspective. It’s very important to note that due to the passage of the AHCA via the reconciliation process, which allowed passage by a simple majority, some of the AHCA provisions do not necessarily directly repeal and replace ACA requirements. Therefore, employers must understand the nuances of the AHCA described below.

- **Repeal of Employer Mandate** – Generally, under the ACA, employers who employed fifty or more full time employees either have to provide affordable, minimum value health coverage to their full time employees and their dependents or be subject to penalties. The AHCA doesn’t actually eliminate the mandate; rather, it sets the penalty for the failure to offer coverage at ZERO DOLLARS, effectively eliminating the mandate. The provision would be applied retroactively, beginning 2016.
- **Repeal of Individual Mandate** – Similar to the employer mandate described above, individuals either have to obtain a certain level of health insurance coverage or be subject to penalties. As with the employer mandate, the AHCA doesn’t eliminate the individual mandate; rather, it sets the penalty for the failure to obtain coverage at ZERO DOLLARS, effectively eliminating this mandate as well, also retroactive to 2016.
- **Delay of “Cadillac Tax”** – One provision that continues to be kicked down the road is the ACA 40% excise tax on high cost employer sponsored health coverage. Initially part of the ACA, the Cadillac Tax was delayed once during the Obama administration, and now the AHCA provides a further delay until 2026. This tax is one that both parties, Republican and Democrat, have taken efforts to eliminate.
- **Employer Reporting of Coverage** – For the past couple of years, employers have been dealing with the headaches known as IRS Forms 1094/1095-B and -C. The AHCA does not explicitly eliminate these forms. Rather, the House Summary document makes the following statement: “Reconciliation rules limit the ability of Congress to repeal the current reporting, but, when the current reporting becomes redundant and replaced by the reporting mechanism called for in the bill, then the Secretary of the Treasury can stop enforcing reporting that is not needed for taxable purposes.” Thus, after acknowledging the fact that ACA reporting can’t be technically repealed per the AHCA via the reconciliation process, the House provides for basic W-2

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reporting, which anticipates making the Forms 1094/1095-B, and -C not necessary.

- **HSA Developments** – The Republican Party made a number of changes to the rules affecting HSA contributions and distributions. The AHCA included these changes: (1) increasing the contribution limits to the out-of-pocket maximums (\$6,550 for self-only coverage and \$13,100 for family coverage, currently), (2) decreasing the HSA penalty tax for non-health expense distributions from 20% to the pre-ACA tax level of 10%, (3) allowing spouses to both make catch-up contributions to a single HSA and (4) providing that individuals who establish an HSA within 60 days of becoming covered under a HDHP may withdraw contributions for medical expenses even if such expenses occurred prior to the establishment of the HSA (but within the 60 day period).
- **Repeal of Medicare Tax Increase** – The ACA added an additional 0.9% tax on wages above a certain level. The AHCA repeals this tax.
- **Over-The-Counter Drug Reimbursement via HSAs/FSAs/HRAs** – The ACHA returns to the pre-ACA rules on the ability to request reimbursement from HSAs/FSAs/HRAs with respect to over-the-counter (OTC) drugs that are not prescribed. Starting in 2018, individuals will again be able to get reimbursed for nonprescribed OTC medications.
- **FSA Limit Repealed** – The ACA set the limit on FSA contributions at \$2,500 (as indexed for inflation). The ACHA repeals this limit.
- **Medicare Part D Deduction** – Under the ACA, the Medicare Part D subsidy was not deductible. The AHCA returns to pre-ACA rules, which allow employers to deduct retiree prescription drug costs without a reduction by the amount of any federal subsidy.
- **Health Insurance Tax Credits** – The income-based system for tax subsidies under the ACA would be changed to an age-based system under the AHCA (with a phase out for income exceeding

\$75,000/\$150,000 individual/joint) beginning in 2020. These credits range from \$2,000 for individuals under age 30 up to \$4,000 for those over age 60. The credits are also capped at \$14,000 for a single family and are indexed for inflation.

- **Continuous Coverage and Pre-Existing Condition Limitations** – This has been a hot topic since the initial drafts of the AHCA became public. Why? For starters, the AHCA establishes a continuous health insurance requirement. This requirement basically provides that if an individual goes without coverage longer than 63 days over the prior 12 month lookback, he/she will be deemed to have a break in continuous coverage. In the event of such a lapse in coverage, the individual will be subject to a 30% surcharge in the individual market (note — not the same as the pre-HIPAA pre-existing condition exclusion rules). Note that per the MacArthur Amendment, states may be able to request a waiver of certain ACA requirements. This would include carriers taking into account health status (i.e., pre-existing conditions) for underwriting, subject to certain limitations (including the requirement to have a lapse in coverage), but not allowing the carriers from limiting access to health coverage for individuals with pre-existing conditions. Additionally, the Upton Amendment provides high-risk pool funding (\$8 Billion) for waiver states.

### OK, So Now What? Do We Need to Act Now?

As the great Lee Corso would say...not so fast my friend. Health care reform was one of, if not the top, action items of the Trump administration. The House Republicans were limited in just how far they could go, both due to Democratic opposition to any changes to the ACA (which necessitated acting under the reconciliation process) as well as opposition within the Republican Party. Yes, a bill made its way through the House, but now it must pass the Senate. The Senate Republicans have already stated that it will be making changes (which will then require

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passage of the new legislation by the House) and that it will be taking its time in acting. We may see the AHCA with a few minor changes, or it may be a very different looking repeal and replace piece of legislation. Therefore, at this moment in time, employers and plan sponsors must recognize that the ACA is still the law of the land, and they should continue to act accordingly under all current ACA requirements.

### Questions?

Contact the Findley Davies | BPS&M consultant with whom you normally work or [Jason Rothman](#) at 216.875.1907 or [jrothman@findleydavies.com](mailto:jrothman@findleydavies.com).

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