

Health Care Reform Round 3: Third Time's the Charm

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The ACA passed exclusively with Democratic votes. Before it failed, the AHCA approach was to rely exclusively on Republican votes. This is a problem.

Our third attempt at health care reform desperately needs to take a different path. A bipartisan effort focused first on employer-sponsored group health plan could provide the foundation for building consensus. Then we could turn to the much more difficult issues facing the individual market and Medicaid.

Round 1: The ACA

The Democrats have an important edge over Republicans in one key respect—they unite. It's inconceivable to imagine intra-party squabbles preventing a cornerstone piece of liberal legislation from reaching the president's desk. Hence, the ACA.

This advantage does have its downsides, though. Major legislation like the ACA passed without any Republican votes is high risk. Its failures fall squarely in the responsible party's lap. The legislation becomes so politicized that there is little opportunity for bipartisanship to address obvious flaws. The bill becomes weaponized for political success of the opposing party.

It's a story we saw with the ACA, ARRA, and Dodd-Frank from the initial years of the Obama administration. The bills' flaws became rallying cries for political ouster, not for making obvious fixes. The result was the Tea Party wave election of 2010.

Round 2: The AHCA

The Republicans have a much harder time uniting. Its members' individualistic spirits do not respond well to vote whipping. It's hard to corral the entire party into supporting the same giant, unwieldy piece of legislation with so many moving parts. We saw this on display with the AHCA efforts. There were certain aspects that appealed to every faction of the party, but no amount of tinkering with the initial draft could bring them to a sufficient consensus.

Of course the story of the AHCA fallout cast the Freedom Caucus wing of the party as the primary antagonist. With 30+ members, its members can stop any bill from passing single-handedly. Although they don't always vote in bloc (displaying even intra-factional disunity at times), their principled perseverance cannot be ignored.

Speaker Ryan called the Freedom Caucus's bluff by largely excluding its members from the AHCA drafting process. He played chicken by assuming they would never prevent an ACA repeal/replace bill from reaching the president's desk—a gamble he lost. The combination of an advanceable, refundable premium tax credit (the core ACA entitlement, modified only to be flat) and the preservation of most of the ACA's market reform provisions (with the notable exception of the last-minute changes to its essential health benefits provisions) was toxic from the start.

The Freedom Caucus threat presents an untenable balancing act for Republicans to legislate without any Democratic support going forward. No bill can pass without passing muster from the conservative stalwarts in the Freedom Caucus. Yet any bill with solid Freedom Caucus support risks losing moderate Republican support from the rank and file members. They can't go it alone.

Round 3: “A Bipartisan Way”

The tagline for the Republican repeal/replace efforts going back many years has always “A Better Way.” The slogan rings true because there is support on both sides of the aisle for the argument that ACA can be improved.

But we now know that a Republican-only bill to replace the ACA is not the “better way.” It can’t be passed, and even if it were, its failings would simply become a new political weapon for the Democrats. There would be no bipartisan efforts to fix the inevitable flaws.

In other words, both parties need to own the replace bill. Both parties need to have a political stake in its success. Both parties need to want it to work. Both parties need to be invested in its implementation and an incentive to perfect it over time. Otherwise, any flaws in the bill will simply mark the call for Democrats to push single-payer healthcare or a public option in a few political cycles—a swing of the pendulum back further than even the ACA dared to go.

Areas of Potential Bipartisan Support

- **Consensus Item #1: Employer-Sponsored Coverage**

The individual market is a small sliver of the health coverage in this country that drives the majority of our problems and disagreement. And Medicaid is such an enormous portion of the federal and state budgets, and so clearly in need of major reform, that it deserves its own bill to ensure it receives our legislators’ full focus. So let’s set those morasses aside to start and solidify what clearly works: employer-sponsored group health plans.

- i) Repeal the Cadillac Tax

This is a 40% excise tax on the cost of “high-cost” coverage. However, because the tax is not adjusted for medical inflation, it will quickly become a backdoor cap on the employer exclusion from income on a broad swath of employer plans (the “Corolla tax”). At the end of 2015, Congress delayed the tax effective date from 2018 to 2020.

There is near-unanimous bipartisan support for repealing the Cadillac tax, which is great news for employers. However, there is also a major problem: replacing the lost \$90 billion (roughly) in revenue that the CBO expects the Cadillac tax would bring in over a ten-year budget window.

The wrong way to address the lost revenue would be to cap the §106 employer exclusion from income. Most Republican proposals prior to the AHCA (including Speaker Ryan’s “A Better Way,” Secretary Price’s “Empowering Patients First,” and the leaked discussion draft of the AHCA) included a cap on the exclusion from income. Don’t kill the golden goose!

Instead, Congress should recognize that the CBO’s scoring of the Cadillac tax is wildly inaccurate. It projects that only about one-quarter of the Cadillac tax revenue would come from the Cadillac tax itself. The other three-quarters is expected to come from employers reducing (non-taxable) health care expenditures in favor of providing higher taxable cash compensation to employees. Most real-world commentators strongly disagree with that assessment.

The better option would be to pay for the Cadillac tax repeal with real enforcement of the §36B advance premium tax credit. The exchanges have largely failed to distribute the required Section 1411 certifications, which likely has resulted in significant overpayments of subsidies to employees who are eligible for affordable employer coverage that provides minimum value. It’s also unlikely that the IRS is making a significant effort to recoup the incorrect advances through its after-the-fact reconciliation process. We could even take a page from the AHCA’s proposal to condition advancing the premium tax credit on prior employer ineligibility verification.

- ii) Repeal the Employer Mandate Pay or Play Rules

The good intentions that sparked the pay or play rules have come with multiple unfortunate consequences. The pay or play rules first create a strong incentive for employers to stay below the 50 full-time employee (including full-time equivalent) threshold on average each calendar year. Any disincentive for small business to hire will continue to be a drag on employment and economic growth.

The pay or play rules also create a strong incentive for employers to satisfy their labor needs through part-time employees. To avoid potential penalties, ALEs must offer minimum essential coverage that is affordable and provides minimum value to any employee who averages 30 hours of service per week. This imposes significant

costs on employers, particularly in industries with a low-paid workforce. Repealing the pay or play rules should therefore also help address the current underemployment problem plaguing many workers still struggling to find full-time work.

Lastly, the methods for determining employees' full-time status under the pay or play rules have presented an unreasonable burden on ALEs. The complexity of the monthly measurement method and especially the look-back measurement method has put the entire full-time concept squarely in the incomprehensible category for most employers—who understandably are more focused on their business endeavors than the intricacies of the Federal Register. This has caused employer to spend inordinate sums on ACA hours tracking/reporting vendors to “automate” this process, largely with disappointing results.

iii) Repeal §6056 ACA Reporting

With the repeal of the employer mandate pay or play rules would come another major benefit—reduced reporting obligations on employers. The §6056 component of ACA reporting is what causes so much time, effort, expense, and even tears to be put into these forms. This is the Part II section of the Form 1095-C. The coding requires integration with payroll, ben admin, and HRIS system in a near-impossible manner.

This information will be largely irrelevant in a post-pay or play world. Rather, the only information that the IRS will need will be for purposes of determining employees' eligibility for the §36B premium tax credit.

The fix: Borrow something useful from the AHCA. It would have replaced the §6056 reporting requirements with a simple box on the Form W-2 reporting months of eligibility for coverage. By tweaking the requirement to report months of eligibility for minimum essential coverage that is affordable and provides minimum value, the IRS will have all the information it needs to properly enforce the premium tax credit reconciliation at the end of the year.

With no need to report the §6056 information to employees, and the elimination of the pay or play rules, employers can finally shed the burden and expense of working with the ACA tracking/reporting vendors. All that would remain would be the comparatively simple §6055 reporting on months of coverage for employees and their dependents. This could be relegated exclusively to the Form 1095-B, with no obligation imposed on employers sponsoring fully insured plans.

• **Consensus Item #2: Child Care Reforms**

There are three main proposals currently making waves in Washington that could result in bipartisan action: a) Ivanka Trump's child care plan, b) a \$1 trillion infrastructure spending package, and c) the border adjustment tax.

The border adjustment tax should live or die in the impending (not bipartisan) tax reform bill that Congress will take up after the AHCA's demise. The \$1 trillion infrastructure bill is probably best addressed as a stand-alone bill. That leaves the Ivanka Trump child care plan as the best candidate to bring at least some Democrats on board with a future health care reform bill.

Anyone in our industry is all too familiar with the complaint that the current (unindexed) \$5,000 dependent care FSA limit is wildly insufficient to cover modern daycare expenditures. Here's an area where Ivanka Trump's proposals can likely garner mainstream Democrat support.

Child Care Expense Deduction

This proposal would permit working parents to deduct child care expenses for four children and elderly dependents. The above-the-line deduction would be available to anyone earning less than \$250,000 (or \$500,000 if filing jointly) annually. Rebates would be available for those eligible for the Earned Income Tax Credit. It would also be available for stay-at-home parents.

Crucially, the deduction limit would be tied to the average cost of childcare in the state (the national average is around \$12,000 per year). That would provide a proper indexing measure into perpetuity—and thereby address the primary flaw of the dependent care FSA.

Dependent Care Savings Accounts

Here's a new acronym to learn: DCSAs. Piggybacking on the overwhelming popularity of HSAs, the DCSA would allow individuals to make deductible contributions to a savings account that grows tax-free and permits tax-free dependent care distributions. The triple-tax advantage!

Unlike dependent care FSAs, DCSAs would not be subject to the use-it-or-lose-it rule and would be available even for those who are not offered the benefit through an employer. Presumably, employers could contribute to the accounts tax-free, and employees could contribute to the accounts on a pre-tax basis through payroll—much in the same manner as HSAs.

Employer On-Site Daycare

Currently only 7% of employers provide on-site daycare (at or near worksite). Ivanka's proposal would enhance the current tax incentives with the hope of making on-site daycare more mainstream.

Current tax law offers a 25% tax credit for facility expenditures and a 10% tax credit for resource and referral costs, capped at \$150,000 per year. A portion of the credit amount is recaptured if the employer fails to offer the on-site daycare services for at least ten years.

This plan would increase the \$150,000 annual tax credit limit, reduce the 10-year recapture period, and permit companies to pool resources to make the credit more attractive.

Paid Maternity Leave

Only a small handful of states mandate some form of paid family leave. Ivanka's proposal would create a new federal program to cover all employees.

The proposal would provide six weeks of paid maternity leave. The benefit amount would equal current unemployment benefit levels, which are less than a worker's regular wages (varies by state). Funding would come from offsetting benefit reductions to the current unemployment insurance contributions paid by employers.

Procedural Approach

We have learned a valuable lesson from the ACA and the AHCA. The former worked legislatively, but has been a political liability ever since. The latter failed legislatively, perhaps saving the party from a similar political fate.

The great danger is that health care reform becomes the new third-rail of politics. These policy decisions are too important to be untouchable, the fixes too apparent to remain broken.

I therefore propose the following:

- 1) **Repeal:** Republicans pass an ACA repeal-only bill through reconciliation, presumably with no Democrat support. The bill should include a transition period of at least three years. This will create the leverage both parties need for true reform. D.C. needs a deadline. Ignore the purported procedural limitations on reconciliation via the Byrd Rule, and instead rely on Vice President Pence (as president and presiding officer of the Senate) to overturn any adverse determinations by the Senate parliamentarian.
- 2) **Replace:** Republicans immediately begin reaching out to Democrats to pass a series of replacement bills. The first such bill should focus on low-hanging fruit to build the needed consensus and momentum to address more difficult areas. These easy fixes are the items discussed above related to employer-sponsored group health plans and child care. Combining these two items should have potential for bipartisan support. Following this success, they can turn to the individual market and Medicaid.

Summary

The country deserves a lasting health care reform law that is policy-driven, not politics-driven. The health stakes are too high and the compliance complexity too enormous to expect the country to see-saw back and forth forever.

This mega-industry of providers, carriers, employers, and the huge number of vendors supporting all three now needs a period successful stability to stave off calls for single-payer or a public option. We can take the first big step down that path by working together to lock-in and enhance the clear competence of the employer-sponsored group health plan market.