

# Compliance Alert



## Senate ACA Repeal and Replace Bill Introduced

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Yesterday, Senate Republicans introduced their draft of the ACA “repeal and replace” bill titled the “[Better Care Reconciliation Act of 2017](#)” (“BCRA”). The BCRA comes after [House Republicans passed their ACA repeal/replace bill titled the “American Health Care Act”](#) (“AHCA”) on May 4.

**See our [Office Hours webinar](#) for full details on the AHCA version of the bill that already passed the House.**

While the Senate BCRA bill largely tracks the House AHCA version with respect to employer-sponsored group health plans, there are a few notable differences in the draft. We have highlighted those differences below.

### Procedural Process

- **Step 1: Pass the House**  
This was completed on May 4 when the AHCA passed by a 217-213 vote margin.
- **Step 2: Pass the Senate**  
Republicans need at least 50 votes to pass the bill. No filibuster is permitted under the reconciliation process. If the vote is tied 50-50, Vice President Pence will break the tie to pass the bill. Republicans hold a 52-member majority.
- **Step 3: Conference**  
Assuming the House does not simply accept and the Senate version of the bill (unlikely), the House and Senate leadership will need to negotiate a compromise bill via conferees from both chambers appointed by GOP leadership.
- **Step 4: Pass Post-Conference Bill**  
The negotiated post-conference bill must be approved by both vote of the House and Senate majority. Debate will be permitted, but no amendments are allowed to the bill that comes out of conference. It is a straight up or down vote.
- **Step 5: President Signs Bill into Law**  
If the House and Senate pass the post-conference bill, it finally reaches the president’s desk. President Trump will have 10 days to sign or veto the bill after its passage. He is expected to sign the bill.

## Timeline

The Senate is expected to schedule the vote as early as next week to be completed prior to the July 4<sup>th</sup> recess. This is an ambitious timeline that may be overly optimistic given the bill's complexity and the difficulty that Senate Majority Leader McConnell will likely face in garnering 50 votes. It is very unlikely that any Democrats will vote for the bill, leaving only a two-member margin to pass.

If passed in the Senate, indications are the Republicans would like to complete the legislative process prior to the August recess that begins at the end of July and runs through Labor Day. There has been discussion of delaying the August recess if necessary to complete the process, but no official determinations have been made at this point.

## Summary of the Senate's Better Care Reconciliation Act Draft Bill Provisions

- **Employer Mandate Pay or Play:** Reduces the §4980H pay or play penalties to zero. This effectively repeals the mandate to offer minimum essential coverage to full-time employees that is affordable and provides minimum value. This is made effective retroactive to the beginning of 2016.

*No notable changes from House bill.*

- **Individual Mandate:** Reduces the individual mandate penalties to zero. This effectively repeals the requirement for individuals to maintain minimum essential coverage to avoid a tax penalty. This is made effective retroactive to the beginning of 2016.

*No notable changes from the House bill.*

- **Cadillac Tax Delayed:** Fortunately, the BCRA does not include a direct cap on the employer exclusion from income for health coverage. This is another huge win for employers. However, like the House AHCA bill, the BCRA preserves the Cadillac tax by delaying its effective date to 2026. There is no expectation that the Cadillac tax will ever take effect—this delay (rather than repeal) is merely to accommodate the budgetary process via reconciliation.

*No notable changes from the House bill.*

- **ACA Reporting:** Not addressed in the Senate bill.

*There are procedural hurdles with removing the ACA reporting requirements through reconciliation. However, the [House summary document](#) (page 13) states that the Secretary of Treasury can stop enforcing the ACA reporting rules as they become irrelevant with the elimination of the ACA components subject to reporting. It is not clear whether 2017 ACA reporting would be required. The House bill provided for reporting via a new box on the Form W-2 used simply to report the number of months in which the employee was eligible for coverage. That provision is not in the Senate bill—so it is not clear if/how they would eventually replace the current ACA reporting structure under the BCRA.*

- **Refundable Tax Credit:** The BCRA preserves the basic §36B advanceable, refundable premium tax credit structure from the ACA that subsidizes coverage on the individual market. It modifies the ACA rules beginning in 2020 by capping eligibility at household income of 350% of the federal poverty line (as opposed to the 400% ACA limit). The credit is divided into different levels by five age bands and pegged to a new benchmark plan.

The BCRA also provides that employees eligible for any employer-sponsored group health plan are blocked from receiving the tax credit, regardless of the employer plan's cost or actuarial value. In other words, the employer plan does not have to meet the prior ACA “affordable” or “minimum value” standards to block the individual from receiving the tax credit.

*This is a major shift from the House bill. The AHCA provides a new refundable tax credit to replace the §36B premium tax credit under the ACA. The House bill would have eliminated §36B as of 2020 and replaced it with a new §36C flat credit that varied only from \$2,000/year to \$4,000/year depending on age, with a family overall cap at \$14,000. There was also an income tested phase-out starting at \$75,000 for individuals, \$150,000 for families.*

- **Pre-Existing Conditions:** The BCRA does not modify the ACA approach to pre-existing conditions, other than to effectively repeal the individual mandate. The ACA's blanket prohibition of pre-existing condition exclusions remains with no incentive or penalty structure to encourage individuals to maintain continuous coverage.

*This is a major shift from the House bill. The AHCA provided that insurers could impose a 30% premium surcharge for up to 12 months for individuals who had a break in coverage (63 days or longer) in the previous 12 months. MacArthur waivers were available to states to impose stronger incentives or health status underwriting. The BCRA may significantly exacerbate adverse selection issues by removing the AHCA's incentive to maintain continuous coverage.*

- **Actuarial Value and Price Variation:** The BCRA modifies the ACA's 3-to-1 age ratio to 5-to-1 (based on an estimated true cost of care ratio at 4.8-to-1) for the individual and small group market, with state flexibility to apply different ratios.

*This is generally in line with the AHCA provisions. The AHCA conditioned the ability to impose a higher than 5-to-1 ratio on receipt of a MacArthur state waiver.*

- **Association Health Plans:** The BCRA creates a new form of association health plans referred to as "small business health plans" ("SBHP"). Although employers already can join together to create a Multiple Employer Welfare Arrangement ("MEWA"), the MEWA rules are strict, and the structure frequently does not avoid the community rating (frequently referred to as "age rating") requirements for small employers. The SBHP approach significantly loosens these requirements.

The BCRA permits employers of any size to join together and create a large group SBHP that avoids the age rating requirements. The sponsor of a SBHP must be certified by the DOL to create the plan, conduct meetings at least annually, establish the SBHP as a permanent entity, have a purpose other than providing health benefits (such as an organization established as a bona fide trade association), and not condition membership based on a minimum employer size.

*This is a major shift from the House bill. The House bill did not include association health plans. It is not clear that association health plans meet the budgetary standards under the reconciliation rules (the Byrd Rule). It will be interesting to see how the Senate parliamentarian advises on this provision.*

- **Health Insurance Premium Tax:** The BCRA repeals the ACA health insurance premium tax, which is currently in a one-year moratorium for 2017. Under the BCRA, the tax would never be reinstated.

*No notable changes from the House bill.*

- **Over-the-Counter Medicines and Drugs (FSA/HRA/HSA):** The BCRA eliminates the ACA requirement that over-the-counter medicines and drugs (other than insulin) be provided pursuant to a physician prescription to be reimbursed by a health FSA, HRA, or HSA. This would be effective retroactive to the beginning 2017.

*No notable changes from the House bill.*

- **Health FSA Limit:** The BCRA eliminates the ACA's \$2,500 cap on health FSA salary reduction contributions (currently \$2,600 after inflation adjustments). It was common for employers to offer a \$5,000 health FSA contribution limit prior to the ACA. This would be effective as of 2018.

*The AHCA would have eliminated the cap retroactive to the beginning of 2017 (although it would likely not be possible to have any significant effect prior to 2018).*

- **HSA Contribution Limits:** The BCRA would significantly increase the annual HSA contribution limit to match the current HDHP out-of-pocket maximum limits as of 2018. The 2018 individual contribution limit would increase from \$3,450 to \$6,650, and the family contribution limit would increase from \$6,900 to \$13,300.

*The AHCA would have made this change effective retroactive to the beginning of 2017.*

- **HSA Additional Tax:** The BCRA restores the pre-ACA 10% additional tax for non-qualified medical distribution from an HSA. The ACA increased the additional tax to 20%. This would be effective retroactive to the beginning of 2017.

*No notable changes from the House bill.*

- **HSA Catch-Up Contributions:** The BCRA allows both spouses to make catch-up contributions to the same HSA. Currently, each spouse must make a catch-up contribution to his or her separate HSA. [See slide 18](#) for a summary of the current limitation. This would be effective 2018.

*No notable changes from the House bill.*

- **HSA Expenses Incurred Prior to Establishment:** The BCRA allows individuals to take tax-free medical distributions from an HSA for expenses incurred prior to the date the HSA is established (generally the date the HSA receives its first contribution). Individuals who establish an HSA within 60 days of becoming covered by a HDHP will be able to take tax-free HSA reimbursements for expenses incurred dating back to the HDHP enrollment. [See slides 23-24](#) for a summary of the current limitation. This would be effective 2018.

*No notable changes from the House Bill*

## **Stay Tuned**

We will continue to update you on the status of the BCRA. Be on the lookout for the potential Senate floor vote late next week.

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