Cadillac Tax Fully Repealed

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It was probably destined for this fate the whole time. After two delays from the originally scheduled 2018 effective date, the Cadillac Tax will never see the light of day.

The Cadillac Tax was officially repealed as part of the massive H.R. 1865 omnibus bill to be signed into law by President Trump today.

The official name of the Act is the "Further Consolidated Appropriations Act, 2020," coming in at a staggering 1,770 pages.

There were three ACA-related stocking stuffers in the Act in Sections 501 – 503 beginning on page 1,426:

1) Repeal of the 2.3% medical device excise tax;
2) Repeal of the health insurance premium tax after 2020; and
3) Repeal of the Cadillac Tax.

Cadillac Tax History

- **March 23, 2010:** ACA enacted with a 2018 scheduled effective date for the Cadillac Tax.

- **2015:** Employers and industry groups engage in massive public relations and lobbying effort to spread awareness of the devastating potential effects of the Cadillac Tax.

- **December 2015:** President Obama signs into law a two-year delay in the Cadillac Tax, pushing the effective date to 2020. The bill also made the 40% excise tax deductible if it were ever to take effect.

- **January 2018:** President Trump signs into law another two-year delay in the Cadillac Tax, pushing the effective date to 2022.

- **December 2019:** President Trump signs into law the full repeal of the Cadillac Tax, finally ensuring that it will never take effect.

Why Did the ACA Originally Include the Cadillac Tax?

The Cadillac Tax was one of the key revenue-raising provisions of the ACA. It was intended to provide a key stream of additional revenue to pay for the additional costs imposed by the ACA, including Medicaid expansion and Exchange subsidies (the premium tax credit and cost-sharing subsidies).

What Would the Cadillac Tax Have Done?

The Cadillac Tax would have provided that health coverage exceeding a statutory dollar limit (generally a baseline of $10,200 for employee-only coverage, $27,500 for family coverage) be considered an "excess benefit." The excess benefit amount would have been subject to a 40% excise tax (originally non-deductible, later made deductible) paid by the employer or the insurance carrier (which would have passed that cost through to the employer).

The Cadillac Tax thresholds were indexed to CPI-U, which was expected to cause the thresholds to increase significantly less than the rate of medical inflation. As a result, Kaiser Family Foundation estimated that originally 26% of employers would have triggered the Cadillac Tax in 2018, increasing to 42% a decade later in 2028. The International Foundation of Employee Benefit Plans (IFEBP) estimates were even more dire, finding that nearly 60% of employers would trigger the Cadillac Tax in 2018.

What Strategies Were in Play to Avoid the Cadillac Tax?

There was a time in 2015 where it looked as though the Cadillac Tax would actually take effect in 2018. At that point, employers had already started the multi-year planning process to avoid the extreme excise tax.

Likely strategies included:

- Moving to HDHP-only medical plan designs;
- Terminating the general purpose health FSA;
- Terminating any non-limited-purpose HRA;
- Ending all employer HSA contributions;
- Ending all employee pre-tax HSA contributions;
- Increased reliance on narrow networks and reference-based pricing to reduce costs;
- Increased spousal surcharges for spouses with access to medical coverage through their employer; and
- Terminating spousal medical coverage altogether.

For more details, see our full webinar on this topic: The Cadillac Tax Part I: Fight the Future.

Why Did Congress Twice Delay the Cadillac Tax Prior to This Full Repeal?

Two main reasons:

1) **Political:** Repeal represents an abandonment of one of the key ACA revenue mechanisms. Although the Cadillac Tax was always politically toxic, there were strong efforts to preserve at least a political argument that the law was fully paid for. President Obama may have vetoed a full repeal during his term. He was quoted stating his belief that the Cadillac Tax would discourage "fancy plans that end up driving up costs."

2) **Revenue:** The CBO and JCT estimated that the Cadillac Tax would raise $91 billion in revenue over a ten-year budget window beginning in 2016 (with only eight years of the tax actually in effect). The estimates were that only 25% of the revenue would come from the Cadillac Tax itself—with the remaining 75% coming from increases in taxable cash compensation to offset employer benefit reductions to avoid the Cadillac Tax. Few believed these estimates to be correct, but it created a difficult budgetary gap to fill when there was still a desire to make up for the tax's lost revenue with alternative measures.

Repeal of the Health Insurance Premium Tax After 2020

The health insurance premium tax's history shares a similarly convoluted history. The tax, which applies only to fully insured medical plans, has been in effect since 2014. Most estimates are that the premium tax adds roughly 2.5% to 4% to premium costs.

There were two "moratorium" years in which the premium tax did not apply. This on again, off again approach to the tax however will be no more. After the tax is in effect for 2020, the Act fully repeals the tax for all future years.

The breakdown is as follows:

- **2014 – 2016:** Premium tax in effect
- **2017:** Moratorium year (tax did not apply)
- **2018:** Premium tax in effect
- **2019:** Moratorium year (tax did not apply)
- **2020:** Premium tax in effect
- **2021 and Beyond:** Premium tax repealed

The tax was already incorporated into 2020 insurance premium costs, hence the delayed repeal until after 2020.

What's Left to be Implemented Under the ACA?

Nondiscrimination Rules for Fully Insured Plans: Implementation Date Unknown—Pending Regulations

With the repeal of the Cadillac Tax, the only other big-ticket ACA item yet to take effect is the fully insured plan nondiscrimination rules.

The ACA provides that insured group health plans will be subject to rules "similar to" the nondiscrimination requirements that have long applied to self-insured plans under Internal Revenue Code §105(h). The insured plan rules technically were to apply at the same time as the first wave of the ACA market reforms (the first plan year beginning on or after September 23, 2010).

However, the IRS issued Notice 2011-1 at the end of 2010, which provided that **employers are not required to comply with the new nondiscrimination rules for insured plans until the Departments issue regulations or other administrative guidance.** The DOL and HHS indicated their agreement with the IRS to delay enforcement. The Notice further states that any such guidance will not apply until plan years beginning a specified period after issuance (e.g., it may not apply until the first plan year beginning on or after six months following the regulatory issuance date).

In light of President Trump's first-day ACA executive order for the regulatory agencies to "waive, defer, grant exemption from, or delay the implementation of any provision or requirement of the [ACA] that would impose…a cost, fee, tax, penalty, or regulatory burden," it remains very unlikely that these fully insured plan nondiscrimination rules will take effect at any time during the Trump administration.

ACA Individual Mandate Still in the News

Almost exactly one year after a federal District Court in Fort Worth Texas struck down the entire ACA as unconstitutional, the Fifth Circuit Court of Appeals issued a ruling that gives us little more insight into the ultimate judicial fate of the ACA.

The District Court found that the ACA individual mandate is no longer constitutional after the Tax Cuts and Jobs Act (TCJA), enacted at the end of 2017, reduced the "tax penalty" to zero at the beginning of 2019. While this is typically referred to as a repeal of the ACA individual mandate, technically it was not. Rather, the "tax penalty" for failure to maintain minimum essential coverage was eliminated to meet the necessary budgetary nexus for the TCJA's reconciliation procedural requirements.

The District Court then determined that because the individual mandate no longer includes a revenue mechanism, it cannot be upheld as constitutional. The 2012 U.S. Supreme Court decision found that the ACA was constitutional only under the federal government's taxing power—not the more broadly interpreted interstate commerce clause powers.

Finding no severability clause in the ACA, and determining that the individual mandate was "essential" to the ACA, the court concluded that that the entire ACA could therefore not stand.

The Fifth Circuit Court of Appeals agreed in its decision that the individual mandate is no longer constitutional because the TJCA eliminated its ability to operate as a tax. However, it questioned the District Court's severability determination. The Fifth Circuit remanded the case back to the District Court, ordering that court to take a deeper dive into whether parts of the ACA may be permitted to remain by reviewing the severability of the individual mandate with greater precision.

Bottom Line: This case is still likely eventually headed to the Supreme Court for a final ruling. The Fifth Circuit's procedural speed bump will likely only serve to delay that ultimate determination. The ACA remains in effect in the interim. Employers must still comply with the ACA employer mandate, the associated ACA reporting requirements, and all other ACA provisions pending a final resolution.

Note that a number of states have implemented state-based replacements for the ACA individual mandate, including Massachusetts (pre-ACA in 2007), New Jersey (2019), Washington D.C. (2019), California (2020), Rhode Island (2020)