Insurance & Financial Services

Office Hours

The American Health Care Act: Details on the ACA Repeal and Replace Bill

AUDIO

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American Health Care Act: The Big Picture—Phase 1

Step 1: Pass the House

- Completed May 4, 2017

Step 2: Pass the Senate

- Early indications are the Senate is likely to make significant changes

Step 3: Conference

- House and Senate leadership negotiate compromise via conferees from both chambers appointed by GOP leadership

Step 4: Pass Conference Bill

- Post-conference bill must be approved by both House and Senate majority
- Debate is permitted
- No amendments permitted

Step 5: President Signs Into Law

- The President has 10 days to sign or veto the bill after the House and Senate pass the same post-conference text

American Health Care Act: The Big Picture—Phase 2

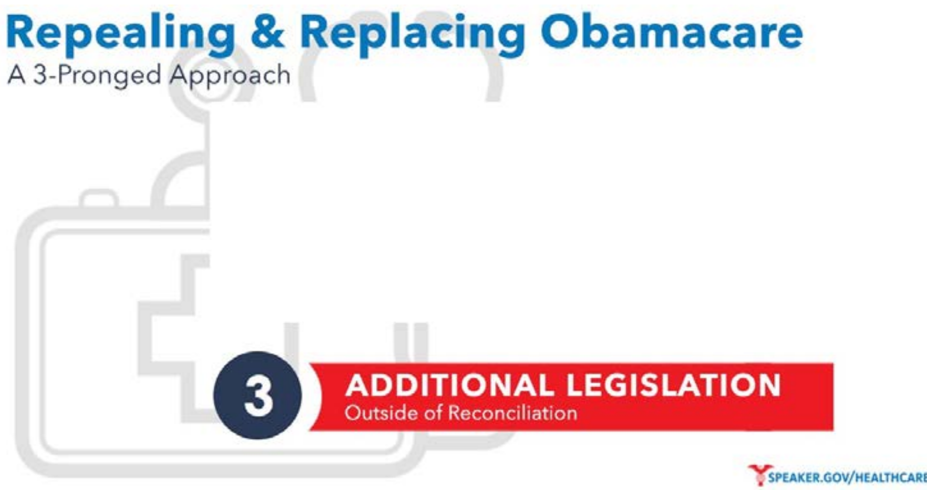
Trump Executive Order

- Directs all executive agencies to:
  - "minimize the unwarranted economic and regulatory burdens of the [ACA]"
  - "exercise all authority and discretion available to them to waive, defer, grant exemption from, or delay the implementation of any provision or requirement of the [ACA] that would impose…a cost, fee, penalty, or regulatory burden" on anyone affected by the ACA

What About DOL/IRS?

- HHS and Secretary Price are typically more focused on issues facing the individual market, providers, and insurance carriers
- Traditionally, the Departments of Labor and the Treasury (IRS) are the primary regulatory agencies with respect to employer-sponsored group health plans
- How much regulatory relief is possible?

American Health Care Act: The Big Picture—Phase 3



Medical Malpractice Reform

- Matching funds for states as incentive to adopt
- Caps on non-economic damages and legal fees
- Loser pays requirements

Association Health Plans

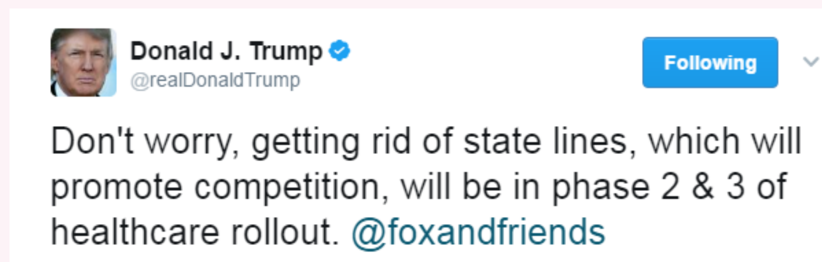
- Small employer risk pooling option as alternative to community rating (age rating)

Wellness Program Reforms

- Eliminate the EEOC authority to regulate wellness programs under the ADA

Sale of Insurance Across State Lines

- Key feature of the Trump campaign's reform platform
- Proposals include "federal floor" rules for capital and surplus requirements, and external review, to sell in a "secondary state"



Insurance & Financial Services

Timeline of the AHCA: **Ride the Rollercoaster**

American Health Care Act:
History: Pre-AHCA Release

January 8, 2016: President Obama Vetoes First Repeal Via Reconciliation

https://www.congress.gov/bill/114th-congress/house-bill/3762/

- Plain repeal, no replace
- Clear that Congress never actually intended for a pure repeal bill (expected veto)

June 22, 2016: "A Better Way"

https://abetterway.speaker.gov/_assets/pdf/ABetterWay-HealthCare-PolicyPaper.pdf

- Speaker Ryan (R-WI) introduces "consensus" House Republican proposals

February 10, 2017: Politico Releases Leaked "Discussion Draft"

http://www.politico.com/f/?id=0000015a-70de-d2c6-a7db-78ff707e0000

- Basic skeleton of legislative draft that eventually became the AHCA
- Would have capped the Section 106 employer exclusion from income at the 90th percentile of annual premiums for self-only and family coverage

February 16, 2017: House GOP Blueprint

https://assets.documentcloud.org/documents/3462852/GOP-Health-Policy-Brief.pdf

- Under pressure to release proposal, House GOP issues blueprint for AHCA
- Largely reiterates and summarizes existing policies proposed in A Better Way

American Health Care Act:
History: Post-AHCA Release

March 6, 2017: American Health Care Act Released

https://www.congress.gov/bill/115th-congress/house-bill/1628/text

- Removed §106 cap on employer exclusion from income!

March 24, 2017: American Health Care Act Fails in First Attempt

- Freedom Caucus 30+ members unite against bill for preserving key ACA provisions
- Speaker Ryan pulled bill from the floor immediately before scheduled vote

April 26, 2017: MacArthur Amendment Compromise

https://rules.house.gov/sites/republicans.rules.house.gov/files/115/OMNI/MacArthur%20Amendment.pdf

- Compromise negotiated between Rep. Tom MacArthur (R-NJ), co-chair of the moderate "Tuesday Group", and Rep. Mark Meadows (R-NC) of Freedom Caucus
- Creates state waiver option for age rating ratio, essential health benefits, and health status underwriting availability—all designed to drive down premium costs

May 3, 2017: Upton Amendment (Compromise to the Compromise)

https://rules.house.gov/sites/republicans.rules.house.gov/files/115/OMNI/Upton%20Amendment.pdf

- Added $8 billion (to existing $130 billion) in high-risk pool funding for waiver states
- Fallback for individuals in waiver states who fail to maintain continuous coverage

MacArthur Waivers:
State Alternatives to Three Core ACA Mandates

MacArthur Waivers

Granted by default unless the Secretary of HHS (Secretary Price) notifies the state within 60 days after the date of the submission of the application that the request failed to meet any applicable requirements. Waivers are effective for a period of 10 years. Stand-alone amendment passed to also apply to Congress.

A

Age Rating Ratio
- AHCA modifies the ACA's 3-to-1 age band to 5-to-1
- Based on an estimated true cost of care ratio at 4.8-to-1
- Waiver permits states to increase permitted age rating higher than 5-to-1

B

Essential Health Benefits
- ACA requires that individual policies and certain small group employer plans provide coverage for a package of 10 "Essential Health Benefits"
- Waiver permits states to define their own list of essential health benefits without regard to the ACA list
- May affect large employer lifetime/annual dollar limit and OOPM provisions

C

Health Status Underwriting
- ACA prohibits insurers from using health status as a factor when underwriting policies in the individual market
- Waiver permits states to allow insurers to include health status as a legal factor when engaging in underwriting for individuals who did not maintain continuous coverage (i.e., break in coverage of 63+ days in prior 12 months)

American Health Care Act
Top 10 Changes

AHCA Top 10 Changes
#1: Employer Mandate Pay or Play

Eliminates §4980H Pay or Play Penalties

- Would be retroactive to January 1, 2016
- Reconciliation rules prevent full repeal, but zeroing out all penalties is the functional equivalent
- No potential "A Penalty" or "B Penalty" for failure to offer minimum essential coverage that is affordable and provides minimum value to full-time employees
- Employers (ALEs) subject to pay or play penalties in 2016 would have those retroactively eliminated

Full-Time Status After Pay or Play?

- Will employers return to plan provisions that set eligibility at those regularly scheduled to work 40 hours per week?
- Will anyone still track employee full-time status by the look-back measurement method (i.e., measurement period, administrative period, stability period)

Cost and Value After Pay or Play?

- Will employers charge more for the employer-share of the premium when no longer bound by the affordability rules?
- Will "skinny plans" be more popular when no longer bound by minimum value rules?

AHCA Top 10 Changes
#1: Employer Mandate Pay or Play

§4980H(a)—The "A Penalty"
AKA: The "Sledge Hammer Penalty"

- **Failure to offer MEC to at least 95% of all full-time employees (and their children to age 26) in 2016 and beyond**
  - Threshold was only 70% in 2015
- The A Penalty is triggered by at least one such full-time employee who is not offered MEC enrolling in subsidized exchange coverage
- 2017 A Penalty liability is $0 (retroactive to 2016)
- ~~$2,260 annualized ($188.33/month) multiplied by all full-time employees~~
  - ~~30 full-time employee reduction from multiplier in 2016 and beyond~~

§4980H(b)—The "B Penalty"
AKA The "Tack Hammer Penalty"

- Applies where the employer is not subject to the A penalty
- **Failure to:**
- **1) Offer coverage that's affordable**
- **2) Offer coverage that provides MV**
- **3) Offer MEC to a full-time employee (where the employer has still offered at a sufficient percentage to avoid A Penalty liability)**
- The B Penalty is triggered by any such full-time employee enrolling in subsidized exchange coverage
- 2017 B Penalty liability is $0 (retroactive to 2016)
- ~~$3,390 annualized ($282.50/month) multiplied by each such full-time employee who enrolls in subsidized exchange coverage~~

AHCA Top 10 Changes
#2: Individual Mandate Tax Penalty

Eliminates the Individual Mandate Tax Penalty

- *Same as Employer Mandate:* Would be retroactive to January 1, 2016
- *Same as Employer Mandate:* Reconciliation rules prevent full repeal, but zeroing out all penalties is the functional equivalent
- No more tax penalty for failure to maintain minimum essential coverage (MEC)
- Employees may choose to go uninsured without tax consequences

The Individual Mandate Tax Penalty: ACA vs. AHCA

	2016	**2017**
ACA Tax Penalty	Greater of 2.5% of Income or $695/Adult	Greater of 2.5% of Income or $695/Adult
AHCA Tax Penalty	Greater of 0% of Income or $0/Adult	Greater of 0% of Income or $0/Adult

AHCA Top 10 Changes
#3: Cadillac Tax Delayed to 2026

ACA "Excise Tax on High Cost Employer-Sponsored Health Coverage"

- Originally was to be effective 2018
- Coverage in excess of $10,200/$27,500 would be subject to 40% excise tax
- Projected by CBO to raise $91 billion over ten-year period (controversial scoring method)
- Many estimated majority employers would eventually trigger because no medical inflation index

First Delay to 2020

- President Obama signed an initial two-year delay into law at the end of 2015
- Pushed effective date to 2020 (and made 40% excise tax deductible for employers)

AHCA Would Further Delay to 2026

- AHCA dropped its initial effort to include a direct cap on the employer exclusion from income for health coverage under §106
- However, without the revenue from the employer exclusion cap (i.e., a "pay-for"), the bill could not have an outright repeal of the Cadillac tax under the reconciliation rules
- Initial legislation delayed the Cadillac tax to 2025—later amended to 2026
- Near universal agreement that it would never take effect after this delay
  - ***Still risk of more direct cap on exclusion as the pay-for until Cadillac tax is repealed***

AHCA Top 10 Changes
#4: ACA Reporting & AHCA Reporting

§6055 and §6056 ACA Reporting via Forms 1094-C and 1095-C Would Fade Away

- No option to fully repeal ACA reporting now because not permitted via reconciliation
- However, official AHCA summary document confirms that Phase 2 will permit Treasury/IRS administrative elimination of ACA reporting in near future when not needed
- Elimination of employer mandate pay or play rules will remove need for portion of reporting
- Unclear if 2017 ACA reporting would be required for employers

AHCA Official Summary Document

https://assets.documentcloud.org/documents/3699788/AHCA-Section-by-Section-Summary.pdf

"The program also calls for simplified reporting of an offer of coverage on the W-2 by employers. 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."

AHCA Reporting Structure: Form W-2

- AHCA approach would limit employer reporting to a simple box on the Form W-2 to indicate the number of months an employee was eligible for coverage
  - May be additional reporting requirements for self-insured plans to show months of coverage
- Employers would also play a more active role in determining whether employees are eligible for the new tax credit under §36C
  - Employees must submit written statement from employer stating whether eligible for coverage prior to receiving advance of the §36C tax credit (ACA approach for §36B is pay and chase)

AHCA Top 10 Changes
#5: Age-Based Tax Credit

Eliminates the ACA §36B Premium Tax Credit as of 2020

What the ACA Did:

- Advanceable, refundable tax credit to purchase coverage on the Exchange
- A *defined benefit* amount based on income and cost of coverage
- Available for households with income up to 400% of the federal poverty line
- Up to $98,400 for family of four in 2017

What AHCA Does:

- Advanceable, refundable tax credit to purchase individual coverage anywhere
- A *defined contribution* amount based on age (does not adjust for ACA factors)

New §36C AHCA Health Insurance Tax Credit as of 2020

Age-Based Tiers:

- *Under Age 30:* $2,000 per year
- *Age 30 to 39:* $2,500 per year
- *Age 40 to 49:* $3,000/year
- *Age 50 to 59:* $3,500/year
- *Over age 60:* $4,000/year

The Details:

- Phases out beginning at $75,000 individual adjusted group income
- Phases out beginning at $150,000 married adjusted gross income
- Reduced by $100 for every $1,000 earned
- Each individual in family may receive
- Family maximum of $14,000

AHCA Top 10 Changes
#6: Pre-Existing Conditions

Pre-ACA Landscape: PCEs Permitted (Primarily in Individual Market)

- Prior to the ACA, insurers on the individual market generally were able to impose pre-existing condition exclusions (PCEs) without federal or state prohibitions
  - Special HIPAA guaranteed issue rules applied for individuals who exhausted COBRA after losing group coverage, with state flexibility in how to structure
- In the group market, the HIPAA Portability rules generally prohibited employer-sponsored group health plans from imposing PCEs for individuals who maintained creditable coverage without a significant break (63+ days)

Life Under the ACA: No PCEs (But Individual Mandate)

- The ACA has prohibited all PCEs since 2014
- Uses *"stick" method* of individual mandate in attempt to drive participation among those with no current medical expenses (with varying degrees of success)

Life Under the AHCA: No PCEs (But Incentive to Maintain Coverage)

- The AHCA uses *"carrot" method* by instead imposing a premium surcharge of 30% for 12 months if an individual enrolls after a 63+ break in coverage in prior year
- The MacArthur Amendment permits waiver states to charge more based on health status underwriting, but <u>only</u> for those who have a break in coverage in prior year
  - Upton Amendment provides additional high-risk pool funding for this waiver state group

AHCA Top 10 Changes
#7: Actuarial Value and Age Ratio

AHCA Eliminates the ACA Metal Tiers

- The ACA requires that plans in the individual and small group market be labelled by metal tiers that are tied to the plan's actuarial value for covered benefits
  - Bronze, Silver, Gold, and Platinum tiers
- AHCA would eliminate that requirement to allow carriers to offer coverage regardless of actuarial value (permitting, for example, "skinny" plans with low-cost premiums)
- Note that "minimum value" concept eliminated by repeal of employer mandate pay or play

Permitted Age Ratio Increased Under AHCA

- The ACA community rating requirements permit variation in cost based on age under a 3-to-1 ratio (i.e., may charge older individuals up to three times the cost)
- The AHCA would permit age rating based on a 5-to-1 ratio
  - Based on an estimate true cost of care ratio at 4.8-to-1 ratio
  - Intended to avoid the need for younger individuals to subsidize older individual coverage
  - Applies only in the individual and small group market

MacArthur Waivers

- States that receive a MacArthur waiver would be permitted to establish an age ratio even greater than 5-to-1
  - May be attractive in some states to lure young, healthy individuals to market

AHCA Top 10 Changes
#8: OTC Medicines and Drugs

ACA Prohibition for FSA/HRA/HSA

What the ACA Did:

- Prohibits account-based plan reimbursement for over-the-counter medicines and drugs (other than insulin) unless provided pursuant to a physician prescription
- Health FSA and HRAs prohibited from such reimbursement
- HSAs prevented from a tax-free medical distribution (income taxes + 20% additional tax)

The Problem:

- Limited the ability to utilize account-based plans
- Resulted in more health FSA forfeitures
- Increased burden on physicians

AHCA Returns to Pre-ACA

OTC Back in Play:

- Eliminates the requirement that over-the-counter medicines and drugs be provided pursuant to physician prescription to reimburse
- Applies to FSA/HRA/HSA

Effective Date:

- Would be retroactive to the beginning of 2017
- Unclear how this would apply to expenses incurred prior to the AHCA being signed into law

AHCA Top 10 Changes
#9: Health FSA Limit

AHCA Eliminates the $2,500 Cap

- The ACA limited health FSA salary reduction contributions to $2,500 per plan year
  - Currently $2,600 after inflation adjustments

Back to the Future?

- Prior to the ACA, it was common for employers to offer a $5,000 contribution limit to the health FSA
- No legal limit—that was just the industry norm (and matched nicely with DCAP)
- Employers would likely return to at least a $5,000 limit if AHCA signed into law
  - Employee pays reduced income and payroll taxes
  - Employer pays reduced employer-share of the payroll taxes (FICA)
- Limit higher than $5,000 risks greater losses to employer through uniform coverage rule (mid-year terminations of employment)
- Limit higher than $5,000 risks greater losses to employee through use-it-or-lose-it rule (end of year forfeitures)

Effective Date

- Would be effective retroactive to the beginning of 2017
  - However, would likely not be possible to have any significant effect prior to 2018

AHCA Top 10 Changes
#10: HSA Contribution Limits

Effectively Doubles the HSA Contribution Limits

- The AHCA would significantly increase the annual HSA contribution limit to match the current HDHP out-of-pocket maximum limits
- This change would be effective retroactive to the beginning of 2017
- Would have until tax filing deadline (4/17/18) to make the full 2017 contribution

Current vs. AHCA HSA Contribution Limits:

	2017	2018
Current HSA Limits	Individual: $3,400 Family: $6,750	Individual: $3,450 Family: $6,900
AHCA HSA Limits	Individual: $6,550 Family: $13,100	Individual: $6,650 Family: $13,300

AHCA Top 10 Changes
#10: HSA Additional Changes

AHCA Returns to 10% Additional Tax

- For non-medical HSA distributions, HSA holders must pay income tax plus a 20% additional tax
- AHCA returns the additional tax for non-medical distributions to 10% (pre-ACA level)
- Would be effective retroactive to the beginning of 2017

Spousal Catch-Up Contributions

- Current law requires that each spouse make their $1,000 catch-up contribution (age 55+) to his or her own HSA
- Problematic because frequently only one spouse maintains a HSA
- AHCA would permit both spouses to make catch-up contributions to the same HSA
- Would be effective beginning in 2018

HSA Expenses Incurred Prior to Establishment

- Current law generally requires that expenses must be incurred after HSA is established (generally meaning funded) for a tax-free medical distribution
  - Exception applies where individual maintained HSA in prior 18-month period
- AHCA would permit tax-free medical distributions for expenses incurred prior to the date the HSA is established
  - Individuals who establish an HSA within 60 days of becoming covered by an HDHP would be permitted to take distributions for expenses incurred dating back to the HDHP enrollment

Wrap Up

Takeaways

The American Health Care Act
ACA Repeal and Replace Bill

Three Key Points to Remember:

A — The AHCA has passed the House. This is a very important first step, but the bill has a long way to go before it can be signed into law by the President. The Senate will pass its own version, there will be conference, and only then will both chambers have a chance to pass the same bill for Trump's signature.

B — The most demanding and administratively burdensome ACA provisions for employers are the employer mandate pay or play rules and the ACA reporting requirements. The AHCA would repeal pay or play entirely, significantly simplify the reporting requirements, plus provide a lengthy Cadillac tax delay to 2026.

C — HSAs are the clear winner under the AHCA. The HSA contribution limit would nearly double, up to over $13,000 for family coverage. There may also be a push in the Senate to permit utilization of HSA for premiums. These shifts will require employers to place a renewed emphasis on their HDHP offerings for 2018. Be prepared to consider adding HDHP options if you don't already!

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The American Health Care Act

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Thank you!

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