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Affordable Care Act - A Repeal & Replace Update

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The election of Donald Trump in November 2016 and the control over both houses by Republicans in 2017 appeared to most experts to signal some form of repeal or rollback of the Affordable Care Act (ACA). As we've witnessed in the first six months of the Trump Administration, though, the repeal-and-replace effort has encountered formidable challenges and it is uncertain what, if any, measure of health care reform legislation may be passed this year. Let's review the key events thus far:

March 6
House Republicans announced a bill to partially repeal and replace the ACA. The bill draft underwent significant debate and revision. There was much disagreement among members of Congress as to the details of the bill. The Congressional Budget Office (CBO) released its economic analysis of the bill on March 13, adding to the debate and controversy. Although cutting the ACA taxes would increase the deficit, savings, in particular from removing premium tax credits and cuts in Medicaid, more than offset the effects on the budget. The net result according to the CBO would be a reduction in the deficit by $337 billion in the next 10 years. It also showed that 24 million fewer people would have health coverage by 2026.

March 24
Republican leaders abruptly pulled their proposed legislation to repeal and replace the ACA from the House Floor due to a lack of the votes necessary to pass the bill, known as the American Health Care Act (AHCA). Speaker of the House Paul Ryan held a press conference shortly after House proceedings were interrupted and the House went into recess. He stated that Obamacare is the law of the land for the foreseeable future and that the House did not have the votes to pass the AHCA.

May 4
After adding a number of amendments created to gain support from the conservative Republican caucus, the revised AHCA was narrowly passed in the House by a vote of 217-213.

The revised CBO score of the AHCA showed the following:

No impact on employers of new CBO score
There is no change. The Affordable Care Act, including employer shared responsibility provisions, continues to be the law of the land.

The CBO score is simply a tool to assess the effects of the legislation on various groups and the general cost of the change. Senators, if they choose to utilize this legislation as their starting point for repeal and replace, can use this analysis to frame the debate on how the various aspects of the bill impact cost and coverage levels.

Coverage levels
CBO's score of the original bill in March showed a significant increase in the number of uninsured individuals and a decrease in the individuals covered under an employer plan. It estimated a decrease of 24 million insured individuals by 2026, including a decrease of 7 million of those covered by their employer's plans.
The new score slightly changed the estimated reduction of insured individuals to 23 million.

Premium reduction
Although all saw an initial increase and then reduction in premiums by 2026, premiums in waiver states[1] would decrease more than non-waiver states. However, policies would cover fewer benefits and out-of-pocket costs would increase substantially. Waivers might destabilize individual health coverage markets in these states.

Deficit reduction
The new CBO score showed savings of $119 billion over the 10-year period 2017-2026, down from the previous estimation of $150 billion.

As with the original bill, the Cadillac tax - the excise tax of high-cost employer sponsored health care (with the effective date delayed until 2025) - is left as the principal source of revenue. The AHCA continues to balance the budget mostly by cutting federal outlays in health care inclusive of Medicaid and tax credits.

June 22
Almost two months after the AHCA passed the House, the Republican leaders in the U.S. Senate revealed their version of an Affordable Care Act (ACA) partial repeal and replacement bill. The Senate Republican leadership described the bill as a "discussion draft." The draft was called the Better Care Reconciliation Act of 2017.

The legislative process in the Senate
Before a vote can take place, the Congressional Budget Office completes and reports to the Senate its required bill analysis of the economic impacts, including cost and estimates as to the number of individuals that would be covered under the proposal. Keep in mind, under reconciliation rules, the Senate bill must achieve at least as much savings as the House bill. The House bill achieved $119 billion in savings over 10 years.

The Senate Parliamentarian must also review the bill and determine whether there are items contained in the bill that do not meet budget reconciliation requirements. Reconciliation bills are limited to items that directly impact the federal government budget either in spending, revenue, or debt limit. Accordingly, items that are ancillary to the federal outlays may not meet that test and may need bipartisan support to get the 60 votes required under regular order. Keep in mind that there are 52 Republican senators, so eight Democrats are needed in this case.

In order to pass under reconciliation rules, the Republicans cannot lose more than two senators if the Democrats stay unified against the legislation. Just as was seen play out in the House, if they tweak the legislation to move it to appease moderates, they risk losing the conservative members, and vice versa. However, they have considerably less wiggle room in the Senate to lose votes.

How do the House and Senate bills compare?
Despite the conjecture that the Senate version would substantially differ from the House's version, the general structure follows the House bill. At a high level, the Senate proposal repeals the bulk of taxes, including the additional Medicare tax on higher income individuals, contained in the ACA. Although some of the effective dates of the repeal provisions vary from the House version, the content is generally the same. Similarly, the Caillac tax, one of the more controversial taxes in the ACA, is retained, but the effective date of the tax moves from 2020 to 2026 in the bills. Consistent in both the House and Senate bills is a push to make it easier to use various health savings vehicles. This push is consistent with general Republican messaging to expand their use.

[1] "Waiver states" are states who are granted a waiver from the Federal Government to be exempt from ACA rules on plan quality, more specifically, the list of essential health benefits an ACA-compliant plan must offer.

The Senate bill also maintains the same trajectory of the House in relation to the employer and individual mandates. The legislation does not negate the individual shared responsibility or employer shared responsibility provisions, but sets the penalty amount to zero dollars retroactive to January 1, 2016. Essentially, this negates the need to maintain certain coverage requirements in order to avoid a penalty. However, the informational filings associated with these mandates were not addressed in this bill. Consequently, this bill does not alleviate employers' obligations to file Forms 1094-C and 1095-C or risk a penalty for not filing accurately or on time.

Additionally, the Senate bill keeps the repeal of the Small Business Tax Credit for purchasing health insurance that was in the House bill, and the repeal of the cost-sharing reduction subsidies. However, it takes a different direction from the House bill by retaining the premium tax credits. The current draft tweaks the formula for these credits, including interjecting age along with income into the matrix for contributions. The House bill proposed to repeal these credits in 2020 and replace them with their new age-based, refundable tax credit ranging from $2,000-$4,000 per individual with various caps and phase-out for upper income individuals.

Another item in the House bill absent from the Senate version is the House bill's continuous coverage requirement to avoid a 30 percent premium surcharge. This was the policy alternative to the individual mandate to ensure healthy individuals still purchased insurance prior to getting sick. In addition, the Senate version does not allow states to opt out of using the community rating formula contained in the ACA; this was one of the last-minute compromises to garner enough support in the House. This compromise drew criticism that repealing components of the community rating provision would allow insurers to charge people with pre-existing conditions more for their insurance in states that opted out.

It should be noted that the Senate bill does contain the larger age ratio option included in the House. Additionally, the Senate bill took a different direction from the House bill, allowing states to modify their markets by interjecting changes to the state innovation waivers and allowing states to determine their formula for medical loss ratio. Other market reforms contained in the House bill are retained in the Senate proposal, but these slight variations in the structure could lead to substantial debate in the weeks and the months to come. There are several other items in the Senate bill that adjust the trajectory of the House bill, requiring resolution between the bills should the Senate bill pass.

June 26

The U.S. Senate began earnest debate on the draft bill known as the Better Care Reconciliation Act of 2017 (BCRA). On June 26, legislators received the score from the Congressional Budget Office (CBO) on the BCRA and the impact of repealing and replacing various provisions in the Affordable Care Act (ACA).

The CBO analysis closely mirrored its assessment of the health care bill passed in the House of Representatives on May 24. That bill, the American Health Care Act (AHCA), went to the Senate, where leadership crafted a different version — the BCRA. The CBO analysis helps frame the implications of the legislation, illustrating its economic impact on various markets and giving employers a preview of what the BCRA would mean to them and their employees if the bill is signed into law.

The upshot: The CBO analysis of the draft Senate bill resembles its analysis of the House bill from May. The implications will vary widely depending on states' choices regarding waivers and the subsets of the population examined.

The CBO's Findings

Uninsured Americans

The Senate bill to replace much of the ACA took a publicity hit when the CBO analysis said it would cause approximately 22 million more uninsured Americans by 2026 — only 1 million fewer than the CBO predicted with the House-passed legislation. Both the Senate and House versions of health care reform could mean as many as 49 million people could lack health insurance by 2026, vs. 28 million under the ACA. As with the House bill, the Senate bill increases the uninsured disproportionately, affecting more low-income and older Americans. Additionally, the CBO report forecast that 4 million people who obtain their coverage through their employer could lose coverage by 2018. This could be the result of the repeals of both the individual mandate and the penalties for employers with 50 or more full-time equivalent employees who don't offer adequate, affordable coverage to their full-time employees. It should be noted that by 2026, employer coverage would rebound to the levels of what is expected under current law.

Deficit reduction

The Senate bill would cut the U.S. deficit by nearly three times as much as the House bill between the 10-year span of 2017-2026. Savings in the House-passed AHCA totaled $119 billion, compared with $321 billion under the Senate bill, according to the CBO. This was key to the bill's status under reconciliation rules, which require the Senate's legislation to achieve at least as much in savings as the House bill. This leaves bill proponents with a $202 billion buffer for negotiations with reluctant senators as the issue gets debated.

Taxes

As with the House bill, the Senate bill repeals the bulk of the ACA's taxes. The only exception in both bills to a direct revenue source is the controversial "Cadillac tax" on high-end insurance policies, which the BCRA reinstates in 2026. As with the AHCA, the BCRA would seek to balance the budget by cutting federal outlays in health care, including cuts to Medicaid and tax credits.

Market reforms

The ACA, still in force, requires insurers to provide 10 essential health benefits, including prescription drugs, maternity care, and mental health care. Additionally, various other market reforms affecting health underwriting rules were contained in the ACA. The Senate bill, similar to the House bill, allows the states to waive some of these market requirements. Although the House and Senate bill took different directions in their approach and what the waivers could contain, the move away from ACA requirements generally would have the same impact on the markets.

Individual (non-group) health insurance market

A small fraction of the U.S. population resides in areas where insurers would not offer non-group coverage; or if the insurers were to offer it, they would likely charge exorbitant premiums to offset reduced subsidies. As with the House bill, the BCRA has the potential to create market instability in certain regions.

Insurance premiums

Similar to the House bill, the Senate legislation would initially increase health insurance premiums; on average, they would decrease over the long term. But again, wide variations will occur because of geography. Out-of-pocket costs for health care would increase. Price hikes could be substantial for states that waive or modify the market reform rules, such as the essential health benefits, which weaken the scope of health coverage in particular areas. Co-pays and deductibles would likely rise, and in some areas the out-of-pocket costs would increase for non-covered services

BCRA's passage uncertain

Senators use CBO scores to start the debate on budget reconciliation bills. A chamber rule disallows provisions ancillary to direct spending, revenue, or debt limit. Because the BCRA now contains many rule-based provisions — such as market reforms — without direct ties to the federal budget, opponents may challenge significant portions of the bill. The complex rules of budget reconciliation in the Senate make it difficult to predict the potential outcome.

To pass items in the bill that may be considered under reconciliation rules, supporters need 50 votes with the Vice President as the tie breaker. Republicans can't lose the votes of more than two senators if Democrats stay unified against the legislation. By attempting to adjust the bill to appease moderates, Senate leaders risk losing the votes of conservative members, and vice versa. Bill supporters must wrestle with budget reconciliation limitations, Republican Party factions, policy implications, and settlement with the House's legislation.

June 27

Senate Republican leaders postponed consideration of their bill to overhaul the Affordable Care Act until after the Fourth of July recess. The Senate leadership had little choice after the number of Senate Republicans who said they would not support the bill rose after the CBO's analysis was released. It was expected that they will use the intervening time to determine what changes to the bill need to be made before proceeding.

July 13

- Senate Republicans revealed their latest version of a bill to partially repeal and replace the ACA
- No timetable set for a vote, as passage not yet guaranteed
- No increase to premium tax credits, no robust changes to Medicaid
- Some ACA taxes maintained, funding for market stability
- Unexpected changes made to health savings accounts (HSAs), small-business health plans, qualified small-employer, health reimbursement arrangement, and ACA Section 1332 state innovation waivers

Latest version aims to placate both moderates and conservatives

U.S. Senate Republicans revealed their latest version of a bill to partially repeal and replace the Affordable Care Act (ACA). The U.S. House of Representatives passed its version of a health care overhaul bill May 4, but the Senate has struggled to craft legislation that will garner enough votes for passage.

Senate leaders have not set a definitive timeline for a vote. Earlier media reports indicated that Republicans, headed by Senate Majority Leader Mitch McConnell (R-KY), hoped to have a vote on the bill during the week of July 10th. However, McConnell announced that he would delay the Senate's August recess until the third week so that members could continue working on their agenda. The Senate was scheduled to go on recess from July 31 until after Labor Day.

The Republican leadership has been walking a tightrope, striving to adjust the legislation to appeal to moderates and conservatives at the same time, in order to secure the votes needed for passage. Generally, tweaks that appeal to conservatives make the moderates less comfortable with the bill, and vice versa. The final version appears to contain more provisions for the conservative members than adjustments for the moderates.

Anticipated changes that didn't materialize

Two looked-for adjustments to the bill's first iteration didn't appear in this second version.

Premium tax credits – Observers expected that Senate leaders would increase the amount of premium tax credits — which the original bill draft significantly reduced from the ACA's current levels — particularly for older individuals. This change was expected to increase support among moderates.

Medicaid – Robust changes to Medicaid from the original Senate version were expected to garner support from moderate senators. The original bill draft markedly reduced federal outlays to Medicaid, increasing the states' burden to support program enrollees.

Expectations that were met

ACA taxes
The revised Senate bill retains the 0.9 percent Medicare tax for employment income above the threshold. Additionally, it keeps the net investment income tax (3.8 percent Medicare Tax) to appeal to moderates, in order to retain additional funds that could go toward funding health care.

Funding for market stability – Cruz Amendment
This amendment appropriates a one-time $70 billion for years 2020 through 2026 (until it runs out) to make payments to health insurers offering plans that don't meet ACA market reforms, as long as they also offer at least one gold-level and one silver-level qualified health plan. The funds are granted to support high-risk individuals in the plans that meet market reforms. The bill specifies that consumers can use health savings accounts to pay premiums for plans that don't meet ACA market reforms. However, these plans would not be eligible for premium tax credits and do not meet continuous coverage requirements. This amendment aims to garner the support of conservative hold-outs.

Unexpected changes
Health saving accounts (HSAs) **–** Effective 2018, the bill would allow plan participants to use an HSA to cover premiums for high-deductible coverage in excess of premium tax credits, the allowable tax deduction, or the amount excludable under gross income tax. Also, it would extend dependents who are allowed the use of accounts, including children under the age of 27.

Small-business health plans **–** The new version clarifies that certified professional employer organizations would be eligible to offer small-business health plans to their customers, as trade associations would be able to offer their member businesses. The revised Senate bill makes changes that address the structure and operation of these arrangements.

Qualified small-employer health reimbursement arrangement – The new version rectifies a drafting error in the original proposed bill; it would preclude enrollees from receiving a premium tax credit any time they receive a qualified small-employer health reimbursement arrangement benefit, whether or not it is affordable.

ACA Section 1332 state innovation waivers
This provision adds a requirement that states applying for waivers must increase enrollment in private plans. This would appear to negate waivers for single-payer and public-option proposals that do not use private insurance. Consequently, states would not have access to the federal funds available with these waivers. Conservatives would tend to support this change to drive funding to the private sector.

Additional reviews expected
A new Congressional Budget Office score was expected during the week of July 17th. The Senate Parliamentarian must also review the latest bill draft and opine on whether it contains items that do not meet budget reconciliation requirements.

If the Senate passes the bill, Congress would have to reconcile the Senate and House versions of the legislation. As of now, the House's scheduled recess has not changed. This will limit the time that legislators have to compromise on the bill before the House goes into recess.

July 18
Two additional Republican Senators announced their opposition to the BCRA, bringing the total 'no' votes above the number Republicans needed to advance the legislation. In response, Republican Senate Majority Leader Mitch McConnell acknowledged that he lacked the votes to pass the BCRA. He announced that the Senate would, instead, vote on a repeal of various provisions of the ACA without putting forward a replacement. Senator McConnell proposed using the repeal bill from 2015. This bill would go into effect after two years to allow time for a new system to be created.

Shortly after the announcement of the new strategy, three GOP senators said that they would not support moving this bill to the floor, essentially creating a roadblock for the path forward. Some experts disagree with this "repeal, then replace" approach as it creates uncertainty in the health care markets. Many moderates generally do not support this strategy.

Senator McConnell said he is expecting a procedural vote to move forward the week of July 24 even with the lack of support.

Businesses, employees unaffected at this time
While Congress wrestles with the repeal/reform effort, the Affordable Care Act continues as the law of the land. When and if the Senate passes a bill, it must be reconciled with the version that passed the U.S. House of Representatives in May. Until both the Senate and the House pass the same bill and the president signs it, the ACA stays in effect — including its employer shared responsibility provisions.

Because the legislative process is fluid, it's important to stay compliant with the current law. Paychex is monitoring this critical issue and will keep you informed as Congress works on it.

For the latest news on Repeal and Replace, visit our Health Care Reform section on Paychex WORX.

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