



TrumpCare? ObamaCare? Should-We-Care?

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Agenda

- The Trump Administration's available regulatory measure
- Affordable Care Act and possibilities for its replacement
- Other developments

Available Regulatory Measures

- Regulatory Moratorium
 - Virtually every new president issues a freeze on new and pending regulations
 - The moratorium that President Trump issued has little impact on employee benefit plans because most regulations issued under the Obama administration are already final
- Eliminating Existing Regulations
 - The President cannot unilaterally overturn existing, final regulations by executive order
 - Revocation or modification of regulations requires public notice and a comment period
 - Executive orders
 - Cannot overturn existing regulations or law
 - Do not create new law
 - Are not enforceable in the courts

Available Regulatory Measures

- Executive Orders (cont.)
 - Three Trump executive orders that potentially affect employee benefit plans
 - Minimizing the Economic Burden of the Patient Protection and Affordable Care Act
 - Directs agencies to take available actions to minimize burden of the ACA, including to waive or defer related taxes and penalties
 - Reducing Regulation and Controlling Regulatory Cost
 - Directs agencies to identify two regulations for repeal for each new rule proposed
 - Enforcing the Regulatory Agenda
 - Direct agencies to establish task forces to evaluate existing regulations and identify regulation that eliminate or inhibit job creation, are outside or unnecessary, impose costs that exceed benefits or that create an inconsistency or otherwise interfere with regulatory reform
 - Little to no immediate impact on employers
- Recent order (Oct. 12) may allow for greater use of health reimbursement arrangements and "association health plans"

Retirement Plan Changes

- In general, modest – no one talks about it
 - "Floated" idea of capping pre-tax 401(k) contributions but no in newly-released House tax bill (from yesterday)
- Fiduciary rule with respect to IRAs and other funds
 - Regulation from Obama administration
 - Would require heightened disclosure of fees and reduce conflicts of interest
 - August 2017: Rule delayed 18 months
- Little in way of executive compensation / 409A changes

ACA Repeal and Replace Efforts

- First struggle: Repeal now, replace later? Repeal and replace at same time?
- Republicans decided to do it all at once
- March 2017: House tries to pass bill but fails
- May 2017: House passes bill
- Summer 2017: Senate struggles with what to do (e.g., start over?)
- July 2017: John McCain casts deciding vote to not proceed
- September 2017: Republicans try again but lack 50 votes
- Now: Moving on to tax reform
 - Several Republicans have promised to revisit it in 2018 and beyond
 - President Trump this week said tax reform should eliminate individual mandate (Republicans ignored the suggestions)
- Trump administration has taken actions to, allegedly, "undermine" ACA individual market
 - But limited effect on employers (group market not really impacted)
- Part of problem is that slogan ("repeal and replace") easy to say
 - But devil in details

American Health Care Act ("AHCA")

- Introduced March 6 in House
- Somewhat tepid support initially by President Trump
 - Then said "This is the bill"
 - But also that it is open for "negotiation" ... But then on 3/10 Sean Spicer said that there would not be "negotiation"
 - Bottom line: Republicans made their push with this bill
 - E.g., Paul Ryan's tax reform proposal would provide a \$3 trillion tax cut; President Trump has called for \$6.2 trillion tax cut

AHCA

- So, what's in it?
 - Many provisions deal with non-employer-specific items
 - E.g., "block-grant" Medicaid funding and roll back ACA expansion
 - Eliminates \$600B in taxes (high earners; tanning tax; medical device tax)
 - Average tax cut of \$0 for households in bottom 90% (those making \$208,500 or less)
 - Top 0.1% (making \$3.75M+) average tax cut of \$165,090 (Tax Policy Center)
 - Easier to make additional Republican-favored tax cuts later in 2017 /2018 through reconciliation process (i.e., no Democrats needed)

AHCA Impact

- Tax credits to individuals to buy insurance

- \$2,000 - \$4,000 per year, cap of \$14,000 per family
- Varies by age (e.g., under 30 is \$2,000; 60+ is \$4,000)
- Begin phasing out at \$75,000 single / \$150,000 family
 - Decrease by \$100 per \$1,000 in extra income
- Five oldest family members taken into account
- No credit for a month if "eligible for other specified coverage"
- "Other specified coverage" is coverage under a "group health plan"
 - But excluding excepted benefits and COBRA coverage
 - So, does coverage under an HRA prevent tax credit? EAPs? FSAs? Wellness? Expensive coverage? Not minimum value?

AHCA Employer Impact

- Reduces individual mandate penalty to \$0 (effective 1/1/2016)
 - To provide incentive to individuals, insurers "shall" charge 30% surcharge for 12 months if no "continuous coverage" (i.e., gap of at least 63 days without coverage)
 - For employers, will likely mean reporting of coverage (perhaps on W-2, form similar to 1095-C or maybe HIPAA certificate of creditable coverage)
 - Because now gaps in coverage become relevant again
 - No minimum value requirement for this coverage, apparently (so true "bare bones" policy may satisfy the rule)
- Insurer age rating increases to 5-1 from 3-1
 - Protests from AARP and other lobbying groups
 - Mainly an issue for individual policies (not employer plans)

AHCA Employer Impact

- Cadillac tax delayed until 2025
- HSAs boosted
 - Increase annual limit to out-of-pocket maximum limits under related HDHP (\$6,550 for self-only; \$13,100 for other) (effect 1/1/2018)
 - Increase from current limits of \$3,400 and \$6,750
 - Both spouses can make catch-up contributions to same HSA

AHCA Employer Impact

- Over-the-counter ("OTC") medications, under ACA, cannot be tax-free under a Health FSA, HRA or HSA
 - Unless have prescription or it is for insulin
 - Effective January 1, 2018, rule would be eliminated
- Employer shared responsibility rule drops to \$0 (retroactive to 2016)
 - Recent newspaper report suggests employers will see IRS notices in November 2017
 - Tracks new IRS rule that individuals must report on Form 1099 if they had "minimum essential coverage"

AHCA Employer Impact

- Health FSA contribution limits no longer capped
 - ACA had capped them (\$2,600 in 2017)
 - Effective January 1, 2018 no cap
 - May need IRS guidance on how to address non-calendar-year FSAs
- New idea: COBRA subsidy
 - Basically, take tax credits noted above (\$2,000 - \$4,000) and use them for COBRA

AHCA Impact

- Will be winners and losers under these changes (in comparison to ACA coverage)
 - HHS Secretary Tom Price (3/12/2017): "Nobody will be worse off financially" under AHCA, but Kaiser Family Foundation projections (upcoming slides) don't show that
 - Congressional Budget Office ("CBO") report released 3/13/2017

CBO Report

- CBO report makes it more difficult – arguably – to pass AHCA (or the next version of it)
- CBO is a non-partisan federal agency that predicts economic and other effects of legislation
 - Currently run by a Republican chosen by Republican House
- Prediction: 14 million fewer Americans with insurance in 2018
 - 24 million by 2026
 - Much of it in individual market and Medicaid

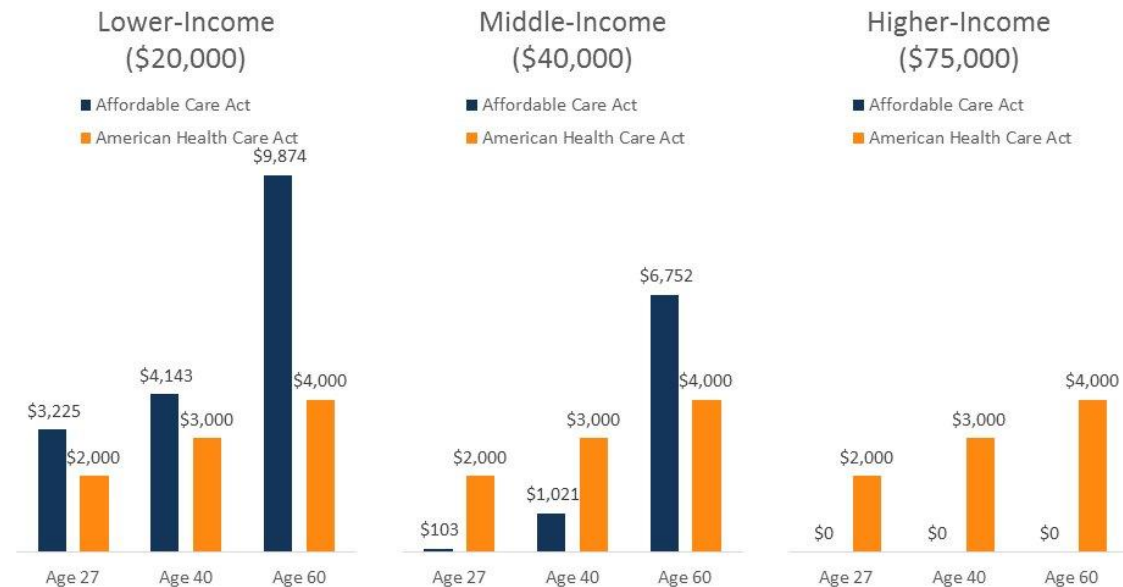
CBO Report

- Includes 3 – 5 million decrease in employer-sponsored coverage
 - Due to ESR Rule / individual mandate going away
 - And tax credits being available to individuals
- In 2018 and 2019, average premiums for policyholders in individual market goes up 15% - 20% higher than would under ACA
- By 2020, premiums go down, so that by 2026 average premiums 10% lower than under ACA
 - Due to older, less-healthy population dropping out and becoming uninsured (leaving healthy / young in individual market)
 - Also lesser coverage expected

Winners / Losers by Income

Figure 1

How House Republicans' health reform plan might shift average health insurance tax credits, based on income and age, in 2020



Source: Kaiser Family Foundation analysis. Note: Data for Affordable Care Act represent the average tax credit available across all counties in the United States, at a given age.

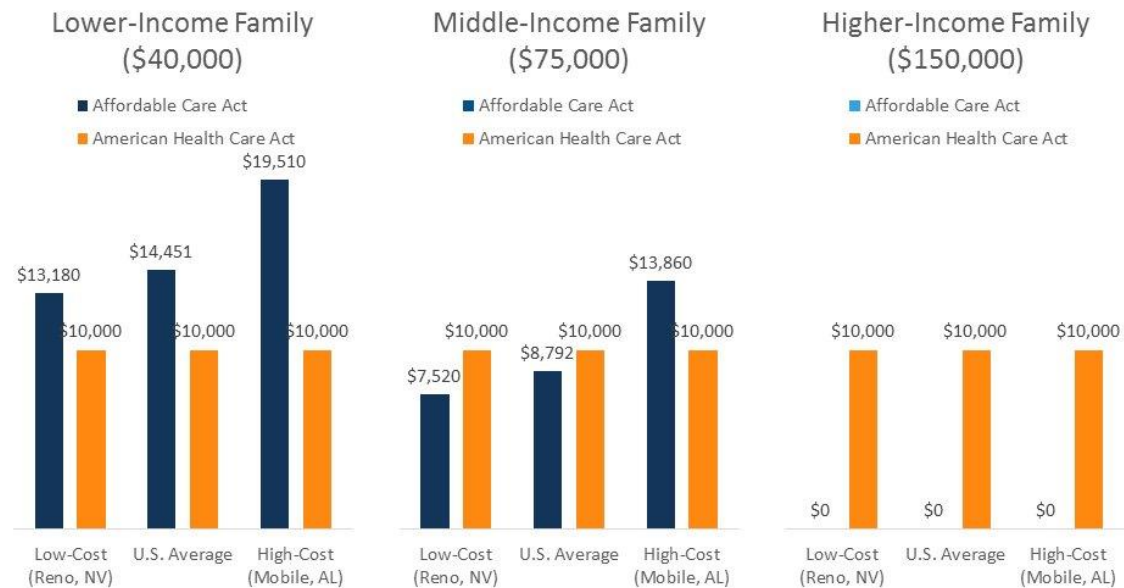


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Winners / Losers by Geography and Income

Figure 3

How House Republicans' health reform plan might shift health insurance tax credits for a family of four, by income & geography, 2020



Source: Kaiser Family Foundation analysis. Notes: Data represent the tax credit available for a family of four with two 40-year-old adults and two kids. In the 2017 ACA exchange markets, premiums in Reno, NV and Mobile, AL are approximately representative of the 25th and 75th percentile, respectively. 2017 ACA premiums were increased according to National Health Expenditure projections for direct purchase.



What Remains of ACA Under "Replacement"?

- Quite a lot – under most Republican bills there was not a full "repeal" or "replace"
- No annual / lifetime limits on essential health benefits
- No pre-existing conditions
- No excessive waiting periods
- Expanded claims / appeal rules
- Preventive care at first-dollar
- Cover children until age 26
- No rescissions
- SBCs
- Increased wellness plan discounts
- Section 1557 nondiscrimination rules
- Many other "suspended" or "ignored" ACA provisions, such as certification of HIPAA compliance; nondiscrimination rules for fully-insured plans
- Essentially, ACA remains in full force unless specifically noted

Other ACA Actions

- Some ideas have bipartisan support
 - E.g., bill from a few weeks ago to simplify employer reporting under ACA (who is covered)
 - Negotiations to shore up individual market (support faded – could it return in December when debt ceiling negotiations heat up?)
- "Cadillac tax" set to take effect in 2020 – but no one likes it
 - 40% excise tax on "excess cost" of health plan
 - E.g., if total family coverage is \$30,000 and "baseline" is \$27,500, "excess" is \$2,500
 - 40% of \$2,500 = \$1,000 non-deductible excise tax employer pays
 - IRS will probably have to start issuing guidance on tax in near future

1094 / 1095 Forms

- These still remain (despite efforts to repeal)
- Generally require employers with self-funded health plans to report:
 - Which employees enrolled in health plan
 - Whether employer offered coverage to enough employees
 - Lots of tracking involved
- About a month ago final forms / instructions came out
 - Very modest tweaks
 - Affordability test now 9.69% for 2017 plan year (was 9.66%)

Transgender Benefits

- Transgender benefits
 - ACA Section 1557 requires that health plans of certain "covered entities" must pay for gender reassignment surgery
 - Impacts entities receiving "federal financial assistance":
 - Health care providers; universities (because student loan = "federal financial assistance"); employers who receive Medicare Part D subsidies
 - On 12/31/2016, Texas federal judge stopped some of it from taking effect on 1/1/2017
 - HHS initially fought judge (under President Obama) – now says it is reconsidering whether to scrap requirement altogether
 - Notice rules still apply today
 - Likely need a "tagline" in many of your benefit communications (e.g., EOBs; notice of privacy practices)

Transgender Benefits

- Same may be playing out for Title VII "sex" discrimination
 - Client sued recently by EEOC because health plan failed to cover gender reassignment surgery
 - Jeff Sessions, last month, said that Title VII does not apply
 - Will courts agree?
 - Seventh Circuit, *Hively v. Ivy Tech. Community College* (2017) – Employment discrimination on basis of sexual orientation violates Title VII
- Recent case (*Tovar v. Essentia Health*) clarified that employee's child not protected by Title VII

Other Health and Welfare Changes

- Some changes proceed
 - E.g., new "summary of benefits and coverage" ("SBC") must be used, generally 1/1/2018
 - Changes are not too difficult, but can be problems with TPAs not providing timely (supposed to have by open enrollment)
- Recent changes made it easier for employers to claim a religious exemption from offering birth control under health plan
 - Part of ACA's "preventive care" mandate for "non-grandfathered" health plans
- December 20, 2016 update on various women's preventive care benefits
 - Apply for plan years starting on or after December 20, 2017
 - Includes breast cancer screening, breastfeeding supplies and services; well-woman preventive visits

Other Health and Welfare Changes

- EEOC issued final wellness plan regulations May 2016
- Beware! Many traps for the unwary
 - 30% of self-only coverage maximum limit
 - Can sometimes add another 30% for spouse
 - Does not coordinate with HIPAA wellness limit of 50%
 - Requires new forms (e.g., spousal authorization) and new security procedures for medical information
- In a twist, AARP sued and just got court to order regulations to be reviewed
 - Proposed rules likely by August 2018
 - 2021 or so for new, final rules

Other Health and Welfare Changes

- Health plan identifier requirement ("HPID") likely will be going away
 - Not that anyone remembers it anyways....
- Similarly, in October 2017 HHS withdrew proposed regulations on certifying compliance with HIPAA "Standard Transactions"
- Forum selection clauses gaining in popularity
 - Force plan participants to bring a lawsuit only in certain jurisdictions (e.g., WI courts)
 - Several recent cases have approved of this

Data Privacy and Security Issues

- Office for Civil Rights ("OCR") begun stricter enforcement of HIPAA Privacy and Security Rules
 - E.g., "desk audits" and some "on-site" audits
- Most common problem is lost laptops, lack of training and failure to conduct security risk assessment
 - Feb. 2017: \$5.5M penalty against hospital for breach of 115,000 records (fail to terminate log-in privileges)
- Sample audit letter on HHS web site
 - "Best practice" to review and do "mock audit"
- "Ransomware" guidance also

Mental Health Parity

- If your health plan is self-funded, consider opting out of these rules
- If not, comply with stringent new regulations
- Monitor litigation in this area
 - E.g., many cases on autism coverage; eating disorder guidance; residential restrictions

State Issues

- Wisconsin budget law may have restricted ability of state governmental plans to cover domestic partners
- Clearly seems to apply to ETF (state plan)
- Likely does not apply, though, to local governmental plan
- Also new rules on school districts reporting various information (e.g., health care plan design; premium contributions)



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