# WHAT THE SENATE'S DRAFT BETTER CARE RECONCILIATION ACT MEANS FOR EMPLOYERS

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Senate Republicans released draft legislation to repeal and replace the Patient Protection and Affordable Care Act ("ACA"). The draft legislation, the Better Care Reconciliation Act ("BCRA"), maintains several key provisions in the House-passed American Health Care Act ("AHCA"), but also includes a number of new provisions that have significant implications for employers sponsoring group health plans. These new provisions have received much less public attention but are of great importance to the employer community. Members of K&L Gates' Public Policy and Law practice have engaged lawmakers, senior congressional staff, and the administration on a number of health care reform issues and are well positioned to help employers understand the BCRA's implications for their business and identify steps they can take to protect their interests.

## KEY "REPEAL" PROVISIONS

As in the House-passed AHCA, the current draft of the BCRA would repeal most of the ACA's taxes and penalties. The penalties associated with the employer and individual mandates would be eliminated retroactively to January 1, 2016, though the underlying requirements to offer and purchase qualifying health coverage would remain. The BCRA would follow the House's approach of delaying until 2026 the so-called "Cadillac" tax on certain high-cost employer-sponsored health plans, although Senate Republicans were reportedly considering a cap on the tax exclusion for employer-sponsored health benefits. Stakeholders would be well served to closely monitor this issue and engage lawmakers on its importance to their business.

Other revenue-raising provisions potentially impacting business owners, particularly the 3.8% tax on net investment income and the 0.9% Medicare payroll surtax, would be repealed as of January 1, 2017, and January 1, 2023, respectively.

The BCRA would also make a number of additional tax-related changes to the ACA that are of interest to employers, including:

- reinstatement of the full business expense deduction for retiree prescription drug costs (without reduction by the amount of any federal subsidy), effective for 2017;
- repeal of the requirement that over-the-counter medications be either prescribed drugs or insulin to be considered a qualified expense reimbursable from a health savings account ("HSA"), health care flexible spending account ("FSA") or health reimbursement account, effective for 2017;
- repeal of the increased tax rate on distributions from Archer medical savings accounts and HSAs, effective for 2017;

- repeal of limitations on contributions to health care FSAs, effective for 2018; and
- repeal of the small business health care tax credit, effective for 2020.

The BCRA would make it easier for states to waive many of the ACA's insurance market regulations, including the essential health benefits ("EHB") requirements, which could impact employers in the small and large group markets. Although employers in the large group market are exempt from EHB coverage mandates, under the ACA, employers may not impose annual or lifetime dollar limits on benefits considered "essential" by a state. Under the BCRA, large group employers would be permitted to reintroduce annual and lifetime dollar limits on all benefits covered by the plan that are no longer considered essential. As in the AHCA, the BCRA would also increase the default age rating ratio for insurers offering small group coverage. Under the new legislation, insurers would be permitted to charge older enrollees up to five times more in premiums relative to younger enrollees, as opposed to the ACA's current limit of 3:1.

## KEY "REPLACE" PROVISIONS

In an attempt to provide more coverage options to small businesses, the Senate's plan would establish a federal certification program for small business risk sharing pools organized by plan sponsors like trade associations. Once a sponsor receives federal certification, it would be permitted to offer fully insured health coverage to employers without being subject to the insurance laws of each state in which it does business. The BCRA contains a number of additional provisions addressing, among other issues, the plan certification process, governance of plan sponsors, and cooperation between state and federal regulators. It empowers the Secretary of Labor to implement the program through regulation. The BCRA's small business risk pooling provisions came as a surprise to many and have generated concern among state regulators who fear selling policies across state lines could destabilize the small group insurance market. It is unclear whether or to what extent these provisions may change; however, senior Republican members have been receptive to stakeholder input.

The BCRA includes a number of HSA-related "replace" provisions that mirror the House bill and would become effective in 2018, including:

- increasing the HSA annual contribution limits to match out-of-pocket limits for HSA-qualified high-deductible health plans;
- permitting married individuals to make "catch-up" contributions to the same HSA; and
- permitting individuals to use HSA funds to reimburse qualifying expenses incurred before the HSA is established, so long as the HSA is established within 60 days of beginning coverage under an HSA-qualified high deductible health plan.

## IMPLICATIONS AND NEXT STEPS

Senate Republican leadership and the White House continue to negotiate with Republican Senators on a number of sticking points. Though certain provisions in the draft bill remain the subject of negotiation, the provisions of greatest interest to employers are likely to remain intact. The Congressional Budget Office is reviewing new compromise proposals that aim to bridge the gap between moderate and conservative Republicans. Changes designed to win the support of moderates could preserve some of the ACA's taxes (including the net investment income tax and Medicare payroll surtax) to help fund more generous tax credits, soften the impact of reductions to Medicaid, and provide more opioid assistance to states. Conservatives have reportedly rallied behind proposals that would permit individuals to use pre-tax HSA funds to pay insurance premiums and allow insurance companies to offer individual market plans that are exempt from the ACA's coverage requirements so long as they offer at least one ACA-compliant plan in each state where they do business.

It is unclear whether these changes will help Republican Senators reach consensus, but Republican leadership has expressed a desire to vote on a bill before the month-long August recess. Stakeholders should continue to monitor health care reform developments and consider opportunities to engage with policymakers as Congress and the administration work toward agreement on legislation.

## KEY CONTACTS

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