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Policy Brief

Employers' Guide to Reforming the Affordable Care Act Through Budget Reconciliation

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Introduction Congressional Republicans appear to be coalescing around a three-part strategy to repeal, repair, and replace the Affordable Care Act (ACA). The first part involves passing a fiscal year 2017 budget reconciliation bill that includes some ACA repeal and replace provisions. The second part involves regulatory action by the Trump administration to reduce unnecessary costs and help stabilize the individual market, and the third part involves passing legislation addressing other aspects of health reform that will require 60 votes to pass the Senate.

Because of deteriorating risk pools and rising costs in the ACA exchanges, part one of the GOP strategy has necessarily focused on stabilizing the individual market, and less attention has been paid to the ACA provisions that impact self-insured employers and drive up their health care costs. Moreover, under congressional budget rules, the vast majority of ACA mandates that concern employers cannot be addressed in any budget reconciliation bill. This Policy Brief identifies what ACA provisions that impact employers are in the draft 2017 budget reconciliation bill that was leaked to *Politico* on February 24, 2017, and what requirements will stay in place during the first part of the repeal and replace process.

Budget Reconciliation Background The Congressional Budget Act allows for the expedited consideration of a legislation that alters taxes or direct spending in existing law, such as the ACA or Medicaid, in order to "reconcile" current law with the budget resolution that Congress has adopted. Although Senate rules usually require 60 votes to pass legislation, a budget reconciliation bill can be passed with just a simple majority in both the House and Senate. Moreover, Senate debate on a reconciliation bill is limited to just 20 hours.

Importantly, the Congressional Budget Act also allows any Senator to raise a point of order to strike an "extraneous" provision from a reconciliation bill. Among other reasons, a provision is considered extraneous if it:

- Does *not* produce a change in outlays or revenues or a change in the terms and conditions under which outlays are made or revenues are collected; and/or
- It produces a change in outlays or revenues which is *merely incidental* to the non-budgetary components of the provision.

For example, while reducing the employer penalties in the ACA to zero is not extraneous because it directly impacts federal revenue, repealing the mandate for employers to coverage adult dependents up to age 26 is an extraneous non-budgetary provision. The Senate Parliamentarian has final authority to determine whether a particular provision is extraneous, not the majority party in the Senate.

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The Draft House 2017 Fiscal Year Budget Reconciliation Bill On February 24, 2017, a draft House Republican reconciliation bill to repeal and replace the ACA was leaked to *Politico*. The leaked "discussion draft" would reduce the employer penalty to zero and repeal the Cadillac Tax, but cap the tax exclusion for employer-provided benefits at the 90th percentile of the cost of self-only and other than self-only coverage. According to the latest Kaiser Health Benefit Survey, the cap for self-only coverage would be approximately $8,500, and the cap for other than self-only coverage would be about $24,000. The tax caps would be indexed to the Consumer Price Index plus 2 percentage points. The discussion draft also contains a number of ACA "replace" provisions, including language that would increase the amount that can be put into health savings accounts (HSA) and allowing HSA's to be used to purchase over-the-counter health care items (see list below). Importantly, the tax cap would not apply to employer HSA or MSA contributions.

It should be noted that the leaked discussion draft, which is dated February 10, 2017, may not be the most recent draft of the House 2017 the reconciliation bill. It could be significantly changed before it is introduced in, or passed by, the House. The final legislation will also be shaped by estimates from the Congressional Budget Office about how much any repeal and replace bill will cost and what its impact will be on the federal deficit. House Republicans plan to begin work on the 2017 reconciliation bill in March and hold crucial votes on the legislation in March and April. That said, the list below shows the major provisions of this recent draft, and highlights the ones that have a direct impact on large employers.

Draft FY 2017 Budget Reconciliation Bill Provisions

(***Bold italic*** provisions would directly impact large employers)

- ***Reduces employer mandate penalties to zero***
- ***Repeals 40% excise tax on employer-provided health benefits (Cadillac Tax)***
  - ***But caps tax exclusion at 90th percentile of benefit cost***
  - ***Approximately $8,500/single coverage, $24,000/family coverage***
  - ***Caps are indexed to CPI plus two percentage points***
- ***Repeals ACA "over-the-counter" limitation on HSAs, FSAs, HRAs, and MSAs***
- ***Repeals ACA tax increase on HSAs and MSAs***
- ***Repeals limit on annual FSA contributions***
- ***Restores employer deduction for expenses allocable to Medicare Part D subsidy***
- Reduces individual mandate penalty to zero while creating a 30 percent premium penalty for not maintaining continuous coverage
- Repeals ACA exchange premium tax credit and cost-sharing subsidy after 2019
- Phases out ACA Medicaid expansion and reforms the program
- Repeals annual fee paid by pharmaceutical manufacturers
- Repeals annual fee on health insurers
- Repeals medical device excise tax
- Repeals Medicare surtax on high-income individuals
- Repeals net investment income tax on high-income individuals
- Reduces threshold for deducting medical expenses on individual income taxes
- Repeals excise tax on indoor tanning services
- Repeals small business tax credit

The 2017 reconciliation bill, which only requires a simple majority in the Senate to pass, is just the first step in the repeal and replace process, with numerous other issues yet to be addressed that will require at least 60 votes in the Senate. According to the House GOP health care reform plan that was released on February 16, 2017, the budget reconciliation process will move forward in conjunction with Trump Administration initiatives and other legislation to increase flexibility for employer coverage and reduce insurance regulation.

What ACA Employer Mandates Remain After Reconciliation? Because of congressional budget rules, the vast majority of ACA mandates that concern employers cannot be addressed in any budget reconciliation bill. This includes all of the benefit mandates, IRS reporting requirements, and waiting period limitations (see list below). Although the ACA's employer penalties could be reduced to zero, the requirement to offer affordable, minimum value coverage to full-time employees would remain law of the land. This could create a potential ERISA private right of action for an impermissible reduction in benefits if employers were to withdraw benefits because no penalty would be attached. While the Trump Administration has some ability to reduce unnecessary costs with the ACA requirements in the table below, many can only be changed by legislation passed with 60 votes in the Senate.

ACA Employer Mandates That Remain After Reconciliation

- Mandate to offer affordable, minimum value coverage
- Definition of full-time and seasonal employees
- Adult dependent coverage requirement up to age 26
- Annual and lifetime limits on essential health benefits
- Essential health benefit requirements
- Free preventive health care benefits
- Ban on waiting periods longer than 90 days
- Coverage requirement for clinical trials
- Annual maximum out-of-pocket payment rules
- Internal and external claims appeals process
- Wellness program rules
- Reporting burdens, including IRS 6055/6056, Summary of Benefits, W-2, Form 5500
- Definition of applicable large employer
- Non-discrimination rules
- Limits on employer opt-out payments to employees who decline employer coverage

Conclusion For employers, the main problem with any reconciliation bill repealing the ACA is that the vast majority of ACA mandates that impact the health care benefits they offer cannot be improved to any great extent by a reconciliation vehicle, but they can become more onerous. Although the draft House 2017 reconciliation bill repeals the ACA's Cadillac Tax, the proposed cap on the tax exclusion for employer-provided health benefits has serious and well-known flaws, and it would constitute a tax increase on middle class Americans and their families, as well as on the businesses Americans are counting on to create jobs. As policymakers move forward with health care reform proposals, they should continue to evaluate the deleterious impact capping the tax exclusion will have on employees and their families who are already struggling to afford health insurance.