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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 This Policy Brief identifies what ACA provisions that impact employers can be repealed in a 2017 budget reconciliation bill, what provisions can be amended, and what requirements will stay in place during the first part of the repeal and replace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 $0.00 is not extraneous because it directly impacts federal revenue, repealing the IRS reporting requirements associated with the employer mandate 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.

What Employer-Related Provisions Can Be Repealed: The 2016 Fiscal Year Budget Reconciliation Bill In January 2016, Congress passed a budget reconciliation bill to repeal a number of ACA provisions. President Obama vetoed that legislation. Although the 2016 bill was not enacted, and Republicans did not expect it to be, it did set a baseline for what ACA repeal provisions the Senate Parliamentarian could allow in some future reconciliation bill. The chart below describes the major provisions in the ACA impacting self-insured employers. Significantly, just four of those provisions would have been addressed by the 2016 bill (see table below).

FY 2016 Budget Reconciliation Bill Provisions

(***Bold italic*** provisions would directly impact large employers in 2017)

- ***Reduce employer mandate penalties to zero***
- ***Repeal 40% excise tax on employer-provided health benefits (Cadillac Tax)***
- ***Repeal limit on use of HSAs, FSAs, HRAs, and MSAs to purchase over-the-counter medicine***
- ***Repeal transitional reinsurance program (expired January 2017)***
- Repeal small business tax credit
- Repeal limit on annual FSA contributions
- Repeal ACA exchange premium tax credit
- Repeal ACA exchange cost-sharing subsidy
- Repeal Medicaid expansion
- Reduce individual mandate penalty to zero
- Repeal annual fee paid by pharmaceutical manufacturers
- Repeal Medicare surtax on high-income individuals
- Reduce threshold for deducting medical expenses on individual income taxes
- Repeal annual fee on health insurers
- Repeal medical device excise tax
- Repeal excise tax on indoor tanning services
- Repeal net investment income tax on high-income individuals

The House 2017 Fiscal Year Budget Reconciliation Plan On February 16, 2017, House Republican leaders released a policy brief that laid out their high-level plan for a 2017 budget reconciliation bill to be introduced in March. Like the 2016 reconciliation bill, the policy brief calls for repealing a number of ACA taxes and reducing the employer penalty to zero, but it also includes a number of ACA "replace" options, including a proposal to 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.

Notably, the policy brief does not mention repealing the Cadillac Tax, which is of great importance to employers and employees. It also does not mention any plan to limit the tax exclusion for employer-provided health benefits, an issue on which Republicans are divided and about which the business community is very concerned. However, the policy brief does discuss two previous Republican attempts (President George W. Bush and Senator John McCain) to eliminate the tax exclusion and replace it with a universal tax credit for individuals and families.

The brief also states the 2017 budget reconciliation process will move forward in conjunction with Trump Administration initiatives and other legislation to increase flexibility for employer coverage, reduce insurance regulation, and allow the sale of insurance across state lines.

It should be noted the policy brief focuses on health care reforms that can be passed through the budget reconciliation process, which requires a simple majority in the Senate, and this 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. House Republicans plan to begin work on the 2017 reconciliation bill in March and hold crucial votes on the legislation in March and April.

FY 2017 House GOP Repeal and Replace Plan

(***Bold italic*** provisions would directly impact large employers in 2017)

- ***Reduce employer mandate penalties to zero***
- ***Repeal limit on use of HSAs, FSAs, HRAs, and MSAs to purchase over-the-counter medicine***
- ***Increase HSA contribution amounts***
- Maintain Medicaid expansion, but put program on a budget
- Replace ACA exchange premium tax credit with an advanceable refundable tax credit
- Fund State innovation programs (high risk pools)
- Reduce individual mandate penalty to zero
- Repeal annual fee paid by pharmaceutical manufacturers
- Repeal annual fee on health insurers
- Reduce threshold for deducting medical expenses on individual income taxes
- Repeal ACA exchange cost-sharing subsidy
- Repeal medical device excise tax

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 table 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 addressed by a reconciliation vehicle. Moreover, the House GOP Policy Brief fails to mention repealing the Cadillac Tax, which is the ACA issue of greatest concern to employers. The Cadillac Tax, or any legislation that would cap the tax exclusion for employer-provided health benefits, has serious and well-known flaws, and would be 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 keeping the Cadillac Tax will have on employees and their families who are already struggling to afford health insurance.