



Affordable Care Act: Repeal and Replace and Other Recent Developments

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Repeal and Related Legislation Introduced

- Repealing “Obamacare” is one of the Republicans’ highest priorities
- Complete repeal is unlikely – Republicans don’t have a supermajority (60 votes) in the Senate, and Democrats could therefore filibuster a repeal bill
- Instead – likely to use the budget reconciliation process to repeal pieces of the ACA
 - “filibuster-proof” – requires only a simple majority (51 votes)
 - reconciliation is limited to spending and revenue-related matters (e.g., taxes, but not insurance protections)
 - Past model: January 2016, President Obama vetoed H.R. 3762, a reconciliation bill that would have repealed the Cadillac Tax and the employer shared responsibility rules

Repeal and Related Legislation Introduced

- Repeal and related legislation recently introduced includes:
 - S. Con. Res. 3 – the “Repeal Resolution” – passed by the House and Senate setting the Congressional budget – to begin the reconciliation process and pave the way for repeal legislation (budget and revenue related provisions)
 - S. 58/H.R. 173 – The Middle Class Health Benefits Tax Repeal Act – to repeal the “Cadillac Tax” - 40% excise tax on high-cost employer-sponsored healthcare coverage, the effective date of which was already delayed until 2020
 - H.R. 285 – Healthcare Tax Relief and Mandate Repeal Act – to amend the Internal Revenue Code of 1986 to repeal the individual and employer health insurance mandates, effective January 1, 2014

Repeal and Related Legislation Introduced

- H.R. 175 – ObamaCare Repeal Act – to repeal the ACA in full, effective as of its enactment
- H.R. 277 – American Health Care Reform Act of 2017 – to repeal the ACA as of January 1, 2018, related reconciliation provisions and other purposes
- S. 28/H.R. 247 – Health Savings Account Expansion Act – expands the use of HSAs to include health insurance payments and increase the dollar limit for contributions to HSAs

Presidential Action to Stop Enforcement, Delay Regulations, or Alter Sub-regulatory Guidance

- On January 20, President Trump signed the Executive Order entitled “Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal.”
- “To the maximum extent permitted by law” orders –
 - The Secretary of HHS and the heads of all other executive agencies with ACA authority, to “waive, defer, grant exemptions from, or delay the implementation of” any ACA provision that would “impose a fiscal burden on any State or a cost, fee, tax, penalty, or regulatory burden on” individuals, families, healthcare providers, health insurers, patients, healthcare recipients, health insurance purchasers, or makers of medical products.

President's Executive Order to “Ease the Economic Burden” of the ACA Pending Repeal

- “The head of each department or agency with responsibilities relating to healthcare or health insurance shall encourage the development of a free and open market in interstate commerce for the offering of healthcare services and health insurance, with the goal of achieving and preserving maximum options for patients and consumers.”
- “To the extent that carrying out the directives in this order would require revision of regulations issued through notice-and-comment rulemaking, the heads of agencies shall comply with the Administrative Procedure Act and other applicable statutes in considering or promulgating such regulatory revisions.”

Proposals to Replace the ACA/Impact on Employers

- The ACA is still controlling law
- Uncertainty – still unclear what will change and when
- President Trump and Congressional Republicans have offered few details about what will replace the ACA
- Some proposals include:
 - capping the employer-provided health benefit tax exclusion
 - expanding the use of Health Savings Accounts ("HSAs") by increasing contribution limits and other means
 - encouraging the use of health reimbursement arrangements ("HRAs")
- Watch for developments; keep up-to-date regarding changes
- Employers considering, implementing or negotiating significant changes to their health benefit programs may want to re-think their strategies now

IRS Extends Form 1095-C Deadline and Penalty Relief and Issues Updated Guidance

- Effective for 2016 plan years, possible penalty tax on an Applicable Large Employers ALEs (ALEs) who don't offer at least 95% of their full-time employees and their dependents "minimum essential coverage" that provides "minimum value" and is "affordable"
- ALE: generally those with 50 or more full-time employees or full-time equivalents
 - Penalty A – applies if the ALE fails to offer health coverage at least 95% of its full-time employees (and their dependents), and any employee obtains subsidized coverage on an exchange.
 - Penalty B – the ALE does offer coverage to at least 95% of its full-time employees and their dependents, but that coverage does not provide minimum value or is unaffordable, and any employee obtains subsidized coverage on an exchange.

IRS Extends Form 1095-C Deadline and Penalty Relief and Issues Updated Guidance

- ALEs must annually report information about the health coverage offered to their full-time employees to the IRS and provide copies of the reports to their full-time employees
- The IRS uses this information to assess whether the penalty tax applies
- Forms 1094-C (transmittal to IRS) and 1095-C (individual employee report) are used to meet the reporting requirements

IRS Extends Deadline for Providing Forms 1095-C to Employees

- ALEs must generally –
 - Furnish copies of Forms 1095-C to employees by January 31 of the following year, and
 - File Forms 1094-C and 1095-C with the IRS by February 28 (March 31 if filing electronically) of the following year
- Notice 2016-70
 - Extends the 2017 deadline for providing Forms 1095-C to employees by 30 days from January 31, 2017 to March 2, 2017
 - Does NOT extend the 2017 deadline for filing Forms 1094-C and 1095-C with the IRS
 - BUT, as in previous years, employers may obtain an automatic 30-day extension by filing Form 8809 before the deadline
 - AND an additional 30-day extension may be requested if hardship conditions apply

IRS Extends Penalty Relief for Good Faith Effort to Comply with Reporting Requirement

- Extends good-faith transitional penalty relief for failure to comply with the reporting requirements
 - Employers are generally subject to a penalty of \$260 per return up to a maximum of \$3,193,000 for failure to timely file/furnish correct information returns and employee statements due in 2017
 - Extends the transition relief from these penalties for employers who can show they made good faith efforts to comply with the reporting requirements for 2016
 - Relief applies only to incorrect or incomplete information on the return/statement, not failure to file or late filing

IRS Publishes Revised Forms 1094-C and 1095-C and Instructions

- The new instructions provide:
 - The 2016 indexed percentage (9.66%) used to determine whether the employer's offer of coverage is affordable
 - The penalties for failure to file/furnish correct information returns/statements due in 2017 (\$260 per form up to a maximum of \$3,193,000)
 - Additional information about reporting offers of COBRA and retiree coverage and calculating the employee's required contribution on Line 15 also included in the updated FAQs

IRS Updates Online Guidance

- The IRS recently updated its online FAQs re ACA information reporting by employers
 - Clarifies reporting for employees who
 - decline the employer’s offer of coverage,
 - are in a “limited assessment period,” or
 - must be treated as “full-time” under the “look-back” measurement method
 - Incorporates recent guidance on calculating the employee’s required contribution for purposes of the affordability test
 - Provides new information for employers with self-insured plans
 - Gives additional guidance on reporting offers of COBRA and retiree coverage
- The IRS has also updated its online FAQs on IRC § 6056 reporting (offers of health insurance coverage) and the employer shared responsibility penalties

IRS Extends Effective Date for Opt-Out Payment Rules

- The opt-out payment rules potentially impact Penalty B by affecting the determination of affordability
 - General rule: coverage is “affordable” if employee contribution for self-only coverage under the employer’s lowest cost plan that provides minimum value does not exceed 9.5% (indexed) of employee’s household income
 - Penalty B –
 - ALE receives certification that at least one full-time employee is enrolled in an exchange and eligible for the a federal subsidy
 - Generally, \$3,000 (indexed) X [the number of full-time employees receiving federal assistance] (smaller than Penalty A)

IRS Extends Effective Date for Opt-Out Payment Rules

- Opt-out Payment Rules
 - “Opt-out payments” – payments to employees who waive employer coverage
 - Two types (Notice 2015-87; proposed regulations):
 - Unconditional – payments made if the employee merely declines employer coverage
 - Conditional – available only if the employee satisfies “a meaningful requirement related to the provision of healthcare to employees” – e.g., proof of alternative coverage

IRS Extends Effective Date for Opt-Out Payment Rules

- These two types are treated differently for affordability
 - The value of unconditional opt-out payments must be added to the employee's required contribution
 - Example: employee's share of premium for self-only coverage under lowest-cost minimum value plan = \$200
 - Employer provides \$100 unconditional opt-out payment to employees who waive coverage
 - "Employee's required contribution" for affordability test = \$300
 - The value of conditional opt-out payments need not be added to the employee's required contribution if part of an "eligible opt-out arrangement"

IRS Extends Effective Date for Opt-Out Payment Rules

- “Eligible opt-out arrangement”
 - The opt-out payment is made only to employees who attest that they, and all members of their “tax family,” will have minimum essential coverage, other than individual coverage, for the plan year to which the payment relates
 - The opt-out arrangement must provide that no payment will be made if the employer knows, or has reason to know, that the employee or any of his or her tax dependents will not have alternative coverage

IRS Extends Effective Date for Opt-Out Payment Rules

- Effective date extended by final regulations
 - Proposed regulations – likely to take effect for plan years beginning on or after January 1, 2017
 - Final regulations
 - The opt-out payment rules will be separately finalized later
 - Until that time, an employer is only required to increase an employee's required contribution by the value of an opt-out payment under an unconditional opt-out arrangement that is adopted after December 16, 2015

DOL Issues New Guidance re HRAs/EPPs

- Health Reimbursement Arrangement (HRA) – an arrangement that reimburses medical expenses
- Employer payment plan (EPP) – an arrangement that reimburses the cost of individual market coverage
- HRAs and EPPs are group health plans subject to the ACA’s market reform requirements – prohibition against annual dollar limits and preventive services requirements
- Generally, an HRA or EPP will automatically fail to satisfy these requirements, subjecting the employer to possible excise taxes, unless it is “integrated” with another group health plan

DOL Issues New Guidance re HRAs/EPPs

- An HRA or EPP may be integrated with a group health plan sponsored by another employer – e.g., a spouse’s employer – only if all employees covered by the HRA or EPP are actually enrolled in MV group coverage (Notice 2013-54, Q&A-4)
- BUT an HRA or EPP that reimburses spouse or dependent medical expenses may not be integrated with self-only coverage under the employer’s other group health plan (Notice 2015-87, Q&A-4)
- What if, in the case of a “family” HRA, the employee is enrolled in self-only coverage and his or her spouse or dependents are enrolled in coverage under the spouse’s employer’s plan?

DOL Issues New Guidance re HRAs/EPPs

- New DOL FAQs provide –
 - A family HRA may be integrated with a non-HRA MV group health plan sponsored by the spouse's employer if that plan covers all of the individuals covered by the family HRA and the other integration requirements are met
 - A family HRA may be integrated with a combination of:
 - Employee self-only coverage under a non-HRA MV group health plan sponsored by the employee's employer, and
 - A non-HRA MV group health plan sponsored by the spouse's employer covering all other family members covered by the HRA

QUESTIONS?