

ACA, HIPAA AND
FEDERAL HEALTH
BENEFIT MANDATES:

Practical Q&A

***T**he Affordable Care Act (ACA), the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other federal health benefit mandates (e.g., the Mental Health Parity Act, the Newborns and Mothers Health Protection Act, and the Women’s Health and Cancer Rights Act) dramatically impact the administration of self-insured health plans. This monthly column provides practical answers to administration questions and current guidance on ACA, HIPAA and other federal benefit mandates.*

Attorneys John R. Hickman, Ashley Gillihan, Carolyn Smith, and Dan Taylor provide the answers in this column. Mr. Hickman is partner in charge of the Health Benefits Practice with Alston & Bird, LLP, an Atlanta, New York, Los Angeles, Charlotte and Washington, D.C. law firm. Ashley Gillihan, Carolyn Smith and Dan Taylor are members of the Health Benefits Practice. Answers are provided as general guidance on the subjects covered in the question and are not provided as legal advice to the questioner’s situation. Any legal issues should be reviewed by your legal counsel to apply the law to the particular facts of your situation. Readers are encouraged to send questions by E-MAIL to Mr. Hickman at john.hickman@alston.com.

Repeal and Replace: What's In Store for Employer Plan Sponsors:

After much anticipation, a "leaked" draft of the House health care reform reconciliation bill became public in mid-February. In less than a week, the final proposal was released and it has now been passed out of the House Ways and Means and Energy and Commerce Committees. Some provisions changed significantly from the leaked draft, including dropping a proposed cap on the IRC 106 employee exclusion for employer provided health and providing income limits on eligibility for the new health coverage tax credits that replace the ACA premium subsidies.

This bill, the American Health Care Act (or AHCA), is the first concrete step in the legislative process to fulfill Republican campaign promises to repeal and replace the ACA. While the commitment to repeal and replace remains firm, as we are writing this some details of the legislation have raised concerns among both conservative and moderate Republicans, although the reasons for the concern vary. Debate was fueled by the recently released official cost estimate from the Congressional Budget Office (CBO) and Joint Committee on Taxation (JCT).

The CBO/JCT analysis shows budget savings of \$337 billion over 10 years but also estimates that 24 million Americans would lose coverage over the same period. Some conservative Republicans argue that the budget savings are not enough, while some more moderate Republicans are concerned about the extent of estimated loss of coverage. These issues are currently being debated and it is possible that there may be some changes as the AHCA moves through the House floor and on to the Senate.

Nonetheless, employer plan sponsors will need to know what is in the AHCA in order to evaluate its potential impact if it becomes law (whether significantly revised or not). This article provides a quick recap of the issues of most importance to employer sponsors of health benefit plans and how they are addressed in the current version of the AHCA.

- **Delay (but not repeal) of the so-called Cadillac Tax.** The IRC 4980I tax on high cost health coverage (the "Cadillac Tax") is retained in lieu of the leaked version's proposed employee exclusion cap. However, the Cadillac Tax is further delayed until 2025. The Cadillac tax remains as originally in effect.

Thus, unlike the leaked bill, which included a carve-out for HSA contributions for the exclusion cap, the AHCA would continue to include HSA contributions from employers (including pre-tax salary reduction contributions from employees). This issue is likely not over, however, as we are hearing that the employee exclusion cap will likely be part of the tax reform discussion later this year.

- **Elimination of individual mandate; the penalty for failure of an individual to have coverage is reduced to zero effective 1/1/16.** Thus, the so-called "individual mandate" would cease back to 2016.

- **Elimination of so-called "pay or play" taxes under IRC 4980H.** The employer shared responsibility taxes are eliminated as they are reduced to zero effective 1/1/16. This would allow employers to revise eligibility language to pre-2015 terms (if desired) – with the only limitations being those that arise under 105(h) for self-funded coverage or insurance contract minimum participation rules.
- **ACA premium tax subsidies remain through 2019.** The existing premium tax subsidies, with some modifications, would remain in place through 2019. The modifications include allowing the credit for catastrophic plans and certain qualified health plans purchases off Exchanges. Starting in 2020, a new health coverage tax credit would replace the ACA premium tax subsidies (see below).
- **No elimination of ACA Reporting (at least not right away).** Unfortunately, applicable large employers (ALEs) will be required to continue reporting offers of coverage during the year to 4980H full-time employees as required by IRC 6056 (Part II of the 1095-C) through the 2019 calendar year (the last forms will be furnished/filed in 2020). The 6056 reporting is relevant not only to the employer shared responsibility taxes but also the ACA premium tax subsidies, which continue through 2019.



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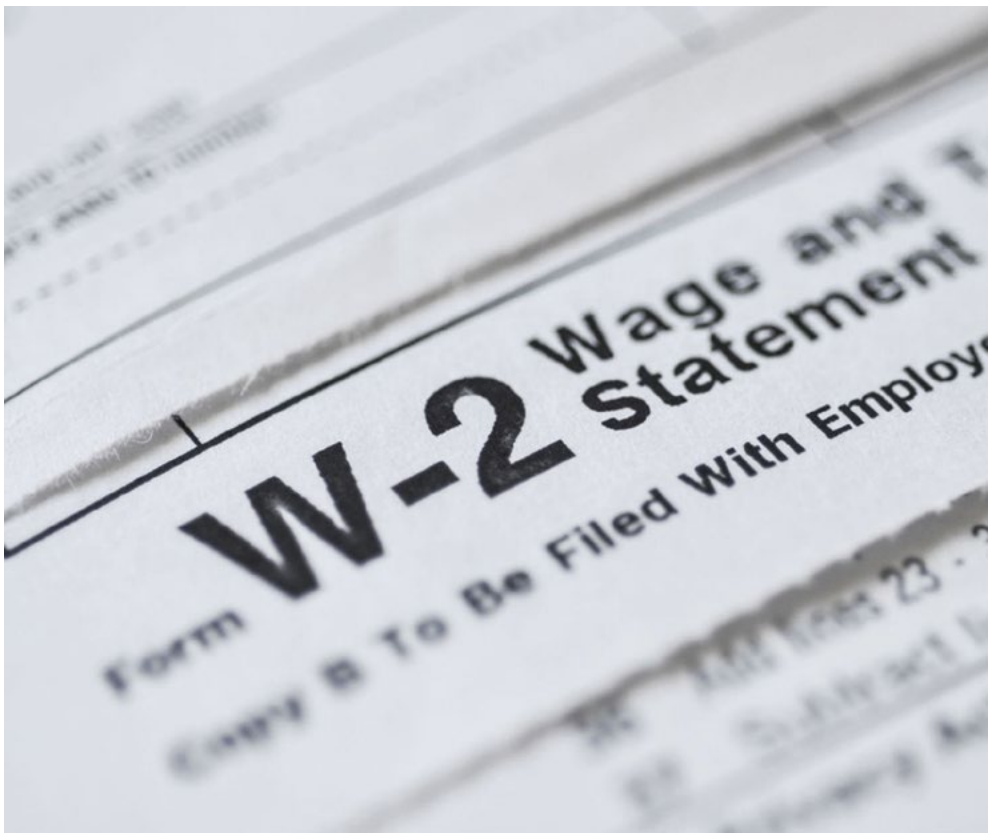
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This reporting may be simplified, however, as employers would likely be able to merely look back at the end of the year and identify those who had months with 130 or more hours of service. The complicated “look back measurement” approach is likely no longer required. Since the individual mandate taxes are reduced to zero effective 1/1/16 the reporting required by IRC 6055, which is used to enforce the mandate, should no longer be required.

Although the repeal of the mandate dates back to 2016, the ACHA likely will not be adopted before you complete the 6055 reporting (Part III of the 1095-C or Form 1095-B for non-ALEs) for 2016. Starting in 2020, there will be streamlined reporting on Form W-2 relating to the new health coverage tax credit (see below).

- **Additional changes of interest beginning in 2018:**

- The Health FSA salary reduction limit (now at \$2600 for 2017) is repealed;
- The prescription requirement for OTC drugs is eliminated;
- Several significant HSA improvements go into effect – including an increased contribution limit and a retroactive effective date for eligible expenses (up to 60 days after the HSA is established).



- ACA taxes OTHER than the Cadillac Tax would be repealed (including the sector tax on health insurance premiums, the additional .9% Medicare tax, etc)
 - Medicare Part D (prescription drug) expenses would again be deductible AND eligible for the RDS subsidy.
- **Provisions to curtail adverse selection.** Beginning with special enrollments in the 2018 year or annual enrollment for the 2019 plan year in the individual/small group market, if an individual went 63 days or more in the last 12 months without minimum essential coverage, they must pay a 30% surcharge on the premium to the carrier.

The surcharge applies to all late entrants (regardless of health status) and is for a 12 month period. The bill relies on the existing HIPAA certificate of creditable coverage reporting from plans to identify the duration of coverage. Some changes to the details of the reporting may be appropriate to reflect the specifics of the AHCA.
 - **New refundable tax credit in lieu of premium tax subsidy.** Beginning in 2020, the current premium tax credit/subsidy will be replaced with a refundable tax credit that increases with age and is phased out based on income. It can be used to purchase coverage in the individual market (not just the Exchange) or pay for unsubsidized COBRA coverage. It is not available to anyone who is eligible for a group health plan other than COBRA or excepted benefits coverage. This affects employers in several ways:

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- When an employee applies for an *advance* subsidy to pay for coverage, the application must include a written statement from the employer that the employee is or is not eligible for coverage. Employers are required to provide this statement upon the request of the employee. The details relating to providing the statement are left to the IRS to determine.
- Employers will have to report offers of group health plan coverage to ALL employees on Form W-2 starting in 2020. It is not clear whether a reporting requirement will apply with respect to retirees for whom a W-2 is not otherwise required. This new reporting requirement is intended to replace the current offer of coverage reporting under 6056. Note the W-2 reporting applies regardless of employer size. (The current requirement that employers report the cost of coverage on Forms W-2 is not changed by the bill.)
- Employers who provide unsubsidized COBRA coverage (as well as insurers that provide coverage eligible for the new credit) will have a new reporting requirement with respect to such coverage, including information such as the names of the individuals covered, the amount of the premium and the amount of any advance credit paid. Information on payment of advance credits is required monthly.
- A mechanism for paying any advance credits to employers for unsubsidized COBRA continuation coverage is to be developed by the IRS. What employers will need to do to receive advance credits will not be clear under the mechanism is developed.

As we go to press, the AHCA is still being debated. All eyes should be on Congress for the next several weeks. ■