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Employment Practices Liability

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ACA Repeal Effort Moves to Senate - Employers Should Continue Compliance for Now

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Executive Summary: The U.S. House of Representatives has passed legislation that would effectively eliminate the Affordable Care Act's (ACA's) employer mandate, open the door for simplified employer coverage reporting, provide greater flexibility for HSAs and FSAs, and delay implementation of the "Cadillac Tax."

Discussion: On May 4, 2017, the U.S. House of Representatives passed the American Health Care Act of 2017 (AHCA). The bill, which seeks to repeal revenue-related portions of the ACA, now moves to the Senate for consideration. Media coverage of the bill has focused on its curtailment of the ACA's Medicaid expansion, repeal of the individual health insurance mandate penalty, and effect on the individual insurance market, but the bill, if approved by the Senate and signed into law, would also have a significant impact on employers subject to the ACA.

The AHCA, in the form passed by the House, would eliminate employer mandate penalties retroactive to January 1, 2016. Congressional committee commentary on the bill suggests that the bill will also provide employer reporting relief. The bill generally limits availability of refundable tax credits for the purchase of individual market insurance to those who do not have another offer of coverage, including an offer of employer coverage, which means reporting of employer coverage offers would need to continue in some form. The committee commentary, however, indicates that the bill calls for simplified Form W-2-based reporting of employer offers of coverage and suggests that the Secretary of the Treasury can suspend enforcement of the current comprehensive reporting regime.

The AHCA also would have payroll and corporate tax consequences that would impact some employers. The bill would eliminate, effective January 1, 2023, the additional Medicare tax of 0.9 percent on employee wages above $200,000 (withholding of the additional tax begins at $200,000, the threshold for application of the additional Medicare tax for individuals filing their tax returns as single, but the tax applies to wages above $250,000 for married couples filing jointly and wages above $125,000 for married individuals filing separately). For employers that offer retiree drug coverage eligible for the Part D Retiree Drug Subsidy, the AHCA would allow companies to deduct the full cost of retiree drug expenses, without a reduction for the value of the subsidy, which is currently required.

In addition to these tax and reporting changes affecting employers, the AHCA also may present new plan design possibilities for employers that sponsor health plans. In terms of consumer-driven features, the bill would increase the maximum contribution to Health Savings Accounts (HSAs) to match the total of deductible and out-of-pocket expenses payable under a High-Deductible Health Plan (HDHP) and permit HSA funds to be used to pay expenses incurred under an HDHP retroactively if the HSA is established within 60 days of the commencement of HDHP coverage. Other tweaks to HSAs in the bill include reducing the tax on distributions not made for qualified medical expenses and permitting two married spouses to both make HSA catch-up contributions. Moreover, for both HSAs and healthcare Flexible Spending Accounts (FSAs), over-the-counter medications would again be eligible expenses if the bill becomes law in its current form. The AHCA also would eliminate the annual cap on contributions for healthcare FSAs.

Additionally, the AHCA would provide plan design relief to employers concerned that a 40 percent excise tax on high-value plans (the "Cadillac Tax") would apply unless they made their plan benefits less generous. Under the bill, implementation of the tax would be delayed to 2026.

Initial commentary on the AHCA, reported by Stephanie Armour and Michelle Hackman in a Wall Street Journal article the morning before the House vote, notes that a provision in the bill allowing states to obtain waivers from remaining ACA requirements would give employers with self-funded plans the opportunity to take advantage of waivers granted to a state, even a state in which the employer had no employees or other operations. A waiver granted to a state, therefore, could conceivably permit employers with self-funded plans to impose lifetime benefit limitations or to eliminate or raise out-of-pocket cost limits on essential health benefits.

The bill still needs Senate approval to become law, and some Republican Senators, such as Shelly Capito (WV), Dean Heller (NV), and Rob Portman (OH), are already on record stating that the bill passed by the House would not be approved in the Senate without changes. Accordingly, as we recommended in our January 25, 2017 legal alert, employers should continue to comply with the requirements of the ACA until the AHCA or alternative legislation modifying or repealing the ACA is signed into law.

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