Client Alert

House Republicans Withdraw the AHCA Before a Planned Vote, but Efforts to Repeal the Affordable Care Act Continue

On Friday, March 24, 2017, the U.S. House of Representatives' Speaker Paul Ryan pulled from the floor the American Health Care Act (AHCA), the proposed legislation to repeal and replace the Affordable Care Act (ACA), once it was clear that the bill was short on votes to pass. Effectively, this means the AHCA will not survive to become law and, at this time, any future efforts to repeal and replace the ACA are uncertain. This may mean, as Speaker Ryan said shortly after the announcement that the bill was withdrawn, "Obamacare is the law of the land. We're going to be living with Obamacare for the foreseeable future." However, as of March 28, there have been reports that the House Republican leaders and the Trump administration have started renegotiations on legislation to repeal the ACA. At this time, there are no details about what may be in any renewed repeal legislation or the timing of its release or a vote.

What the AHCA Would Have Done

Among other things, the AHCA would have retroactively repealed the individual and employer mandate penalties, delayed the 40% "Cadillac" tax on employer-sponsored health plans, made significant changes to the ACA insurance coverage and marketplace stabilization provisions, enhanced health savings accounts (HSAs), provided relief from many of the ACA's taxes and fees, and curtailed Medicaid reforms.

The AHCA was intended to be Phase I of a three-phase approach to repeal and replace the ACA through the budget reconciliation process, which requires a simple majority vote in Congress. Phase II was envisioned to include regulatory relief by Health and Human Services (HHS) Secretary Thomas Price. Phase III legislation would have repealed the ACA market reforms, permit the sale of insurance across state lines, and effectuate other provisions that could not be addressed through the budget reconciliation process because of the Byrd rule, which limits reconciliation provisions in the Senate to provisions that affect government revenues and outlays.

Why it Failed

In large part, the bill failed because the more conservative wing of the Republican Party, known as the Freedom Caucus, was against the bill because of its preservation of certain ACA provisions. Prior to the vote on the bill, which was initially scheduled for Thursday, March 23, 2017 changes were introduced via what was referred to as the "Manager's Amendment" to add concessions (such as accelerating the repeal of most of the ACA tax provisions) in the hope that the Freedom Caucus, representing more than 30 members,

would vote in favor of the bill. However, when realizing that even those concessions were not enough, additional concessions, including the repeal of the federal "essential health benefits" definition, were added. At that point, more moderate Republicans were voicing concerns. Late Thursday, President Trump issued an ultimatum, demanding a vote on Friday and threatening Republicans that the ACA would remain the law if Republicans did not back the AHCA. By Friday afternoon, it was apparent that a compromise could not be reached, and the bill was withdrawn (at President Trump's request) without going to a vote.

What Does This Mean for Employers

At least for the short term, the ACA, including the employer and individual mandates (including associated reporting), remains the law of the land. Until further notice, employers must stay the course on their compliance efforts.

Administrative Relief May Be Forthcoming

Consistent with the President's Executive Order issued immediately after his taking office, there may be pressure on HHS Secretary Price in the short-term to provide regulatory relief to the extent permitted by the ACA. However, it is unclear whether any such relief will focus on issues facing employer-sponsored group health plans.

Future Legislative Efforts Uncertain

President Trump could remain firm on his ultimatum and not support any future efforts to repeal the ACA and test his theory that it will "explode." One way the Republicans may help hasten this "explosion" is by choosing not to pursue a lawsuit filed by Congressional Republicans during the Obama administration that would de-fund the cost-sharing reduction subsidies paid to insurers to reduce out-of-pocket costs for low-income enrollees, which the Republicans have asserted are illegal. In that case, Republicans argued that Congress never actually gave the Obama administration funding for the program that's being used to pay insurers. A district court judge decided in their favor, but the Obama administration appealed the case. The case was delayed in February and is currently on hold, with an update due in May. Many believe these payments are essential for the stability of the insurance market. It remains to be seen whether the current administration will drop the case and Republicans will fund the next round of subsidies in the short-term spending bill due at the end of April in exchange for a commitment by insurance companies not to abandon the market over the next few weeks. Many conservatives may view this course of action as "giving up" on repeal and may not support it unless it is part of a larger repeal and replace effort.

Initially, the Trump administration and other Republican leadership stated that they intended to move on to tax reform and other initiatives at the top of the Trump administration's agenda. However, there is nothing that could stop Republicans from

trying to garner support for another repeal effort, and, in fact, there have been recent reports that the House Republicans and the Trump administration are back in negotiations on repeal legislation. The details and timing of such renewed efforts have yet to be released. It is possible that the Republicans may offer piecemeal legislation to address certain components of the ACA, rather than a complete repeal.

ACA Taxes Repeal May Be Left Out of Any Tax Reform

Taxes associated with the ACA will remain untouched while Congressional Republicans work on reforming the rest of the tax code, House Speaker Ryan said following the March 24 decision to pull the AHCA from a planned House vote. According to the latest Congressional Budget Office report, repeal of the ACA taxes would have reduced revenues by nearly $1 trillion over the next ten years. Republicans believed that repealing the ACA taxes first and being able to offset them with ACA spending cuts would have made tax reform easier. According to Ryan, failure to pass the AHCA "just means the Obamacare taxes stay with Obamacare. We're going to go fix the rest of the tax code."

ACA Taxes Repeal May Be Funded by Cap on Employer-sponsored Health Coverage

However, ACA tax repeals may be part of the larger tax reform effort if other tax expenditures would be used to finance the repeal. One option that has been suggested is instituting a cap on the exclusion for employer-sponsored health coverage. Initial leaked drafts of the AHCA had included such a provision, but were not included when the bill was introduced earlier this month after there was political pressure by employer groups to eliminate it.

While it is not quite clear yet whether the dust has settled, employers should proceed with the expectation that the IRS will begin enforcing the employer mandate via the ACA reporting forms, and prepare for the return of the health insurance industry tax (HIT) in 2018 (the HIT affects fully-insured medical, dental and vision plans, but was under a one-year moratorium for 2017). Lastly, the "Cadillac" tax is expected to be effective in 2020, so employers should also continue evaluating how their plans may be impacted. Of course, it's certainly possible that the "Cadillac" tax will be delayed again in the future.

About The Authors. This alert was prepared for Boston Benefit Partners, LLC by Marathas Barrow Weatherhead Lent LLP, a national law firm with recognized experts on the Affordable Care Act. Contact Peter Marathas or Stacy Barrow at pmarathas@marbarlaw.com or sbarrow@marbarlaw.com.

The information provided in this alert is not, is not intended to be, and shall not be construed to be, either the provision of legal advice or an offer to provide legal services, nor does it necessarily reflect the opinions of the agency, our lawyers or our clients. This is not legal advice. No client-lawyer relationship between you and our lawyers is or may be created by your use of this information. Rather,

the content is intended as a general overview of the subject matter covered. This agency and Marathas Barrow Weatherhead Lent LLP are not obligated to provide updates on the information presented herein. Those reading this alert are encouraged to seek direct counsel on legal questions.

© 2017 Marathas Barrow Weatherhead Lent LLP. All Rights Reserved.