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WHAT A DIFFERENCE AN "H" MAKES

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Late on Monday, House Republicans revealed, in two parts the American Health Care Act ("AHCA") that is designed to meet the Republicans' promise to "repeal and replace" the ACA. In many respects, the AHCA is less "repeal and replace" and more "retool and repurpose," but there are some significant changes that could affect employers, if this bill becomes law as-is. Below is a brief summary of the most important points:

- **Employer Mandate, We Hardly Knew You.** The ACA employer play or pay mandate is repealed retroactive to January 1, 2016, so if you didn't offer coverage to your full-time employees, then this is the equivalent of the Monopoly "Get out of Jail Free" card.
- **OTC Reimbursements Allowed from HSAs and FSAs, Without a Prescription.** This goes back to the old rules that allowed these reimbursements. This would begin in 2018.
- **Reduction in HSA Penalty.** One of the pay-fors for the ACA was an increase in the penalty for non-health expense distributions from HSAs from 10% to 20%. The AHCA takes it back to 10% starting in 2018.
- **Unlimited FSAs Are (or Would Be) Here Again.** AHCA repeals the $2,500 (as adjusted) limit on health FSA contributions starting in 2018.
- **Medicare Part D Subsidy Expenses Would Be Deductible Again**. The ACA still allowed Medicare Part D subsidies to be excluded from a company's income, but denied the deduction, for tax purposes, for any expenses that were subsidized. This reinstates the prior law that allowed a "double tax benefit" of both the exclusion of the subsidy from income and the deduction for the costs funded by the subsidy starting in 2018.
- **A New COBRA Subsidy.** The AHCA does away with ACA's income-based subsidies in favor of age-based subsidies from $2,000 to $4,000 per individual (with a max of $14,000 for a family) with a phaseout for incomes over $75,000 per year ($150,000 for married filing jointly). However, unlike the ACA subsidies (which could only be used for individual market insurance), the new subsidies would also be available for unsubsidized COBRA coverage. This would not kick in until 2020. The subsidies are adjusted based on the CPI+1, which means they are

probably unlikely to keep pace with medical inflation. Additionally, any excess subsidy (which seems unlikely) would be put into an HSA for the individual's benefit.

- **Trading in The Cadillac Tax for a Newer Model Year.** Hearing the outcry of employers who did not want their health benefits taxed, the bill instead kicks the Cadillac Tax down the road. Instead of applying in 2020, it now applies in 2025. There is no adjustment to the thresholds in this bill, so it will still pick up coverage that is not all that "Cadillac" (despite its name). Despite being highly unpopular, the Cadillac Tax has basically survived.

- **HSA Enhancements.** The HSA contribution limits would be increased effective in 2018 so that they are the same as the out of pocket maximums that apply to HSAs (currently $6,550 for self-only coverage and $13,100 for family coverage). Additionally, expenses incurred up to 60 days before the account is established could be reimbursed from the account.

- **Continuous Coverage Requirement.** In lieu of the individual mandate, the law would require individuals to maintain continuous coverage (with no more than a 63-day break). If they did not, then insurance companies could assess a 30% enrollment surcharge above their regular premium for twelve months. This is designed to encourage individuals to stay in the insurance market, even if they don't need coverage. Employers will recognize the 63-day break rule from the old HIPAA creditable coverage rules. This is basically the same concept, only applied across both employer plans and the individual market (the HIPAA rules did not apply to the individual market). And unlike the HIPAA rules, the penalty here is a 30% premium increase, whereas under the HIPAA rules, pre-existing conditions could be excluded for a period of time if the individual did not maintain creditable coverage. For employers, this probably mostly would mean a return to having to issue creditable coverage certificates.

The proposed AHCA makes many other changes that are beyond the scope of this post, but these are the ones that are most likely to have an impact on employer plans. Of course, at this point, this is just proposed legislation and there's no telling how much (if any) of this will survive the legislative process. At least now, however, some legislators have something specific with which to work (and others have something specific to criticize).
