WELLS FARGO INSURANCE

Employee Benefits Compliance Alert – May 5, 2017

House Passes Revised ACA Repeal and Replace Legislation

Summary

- On May 4, 2017, the U.S. House of Representatives passed the American Health Care Act (AHCA)
- Two amendments were made to the AHCA bill that passed the U.S. House of Representatives:
  - The MacArthur amendment (state waiver program)
  - The Upton amendment (creates a fund for the state waiver program)
- The bill will now go to the U.S. Senate, and it is widely expected additional changes will be made

Less than six weeks after the withdrawal of their first attempt (see our March 27, 2017 Employee Benefits Compliance Alert), on May 4, 2017, the Republican-controlled U.S. House of Representatives passed a modified version of their prior legislation that would partially repeal and replace the Affordable Care Act (ACA). The bill, the American Health Care Act (AHCA) now goes to the U.S. Senate, where it is widely expected that additional changes will be made before it can be passed by that chamber of Congress.

To secure passage in the House, two key amendments were made to the original version of the AHCA (see our Alert referenced above for a general description of the key elements included in original version of the AHCA).

MacArthur amendment

First, Representative Tom MacArthur (R-NJ) proposed a state waiver program in order to secure support for the AHCA by more conservative members of the Republican Party, who sought a more complete repeal of the ACA. Under the MacArthur Amendment, individual states may apply for three different kinds of waivers from existing ACA requirements:

- **Essential health benefits**. After January 1, 2020, a state could specify its own set of essential health benefits for all purposes in the individual and small group markets. Essential health benefits are the categories of benefits that have to be covered by insurers. By reducing the number of mandated benefits, the premium cost for individual and small group insured products would be lower. In addition, since the ACA's prohibitions on lifetime and annual dollar limits and the cap on out-of-pocket expenditures only apply to essential health benefits, states will also be able to indirectly control these ACA consumer protections, even for large group and self-insured employer plans.
- **Health status underwriting**. Generally beginning with the 2019 plan year, a state could allow insurers to resume health status underwriting on individuals who do not maintain continuous coverage (having a gap of at least 63 days in coverage in the preceding year) in lieu of imposing the 30 percent premium penalty on such individuals as provided in the AHCA. As a result, this provision eliminates the ACA's community rating requirement for certain individuals. Because allowing health status underwriting could make coverage unaffordable to individuals with preexisting conditions, a state will only qualify to apply for this type of waiver if it offers a high-risk pool or participates in one of two different forms of reinsurance programs.

- **Increased age ratios**. Effective for plan years beginning on or after January 1, 2018, a state could set the age ratio for pricing individual and small group health insurance products at rate higher than the 5 to 1 ratio included in the AHCA, which was an increase over the 3 to 1 ratio included in the ACA. This would allow carriers to price products that would be much less expensive for younger enrollees but more expensive for older enrollees.

The mechanics for applying for waivers and the approval process by the Department of Health & Human Services are so streamlined that essentially any state that wants a waiver would get one.

Upton amendment

The second key amendment proposed by Rep. Fred Upton (R-MI) creates a fund of $8 billion for the years 2018 to 2023 to be granted to states that obtain the health status underwriting waiver described above. These funds must be used by the state to provide assistance to reduce premiums or other out-of-pocket costs for individuals whose premiums increase due to the waiver. Even if these funds are combined with other amounts granted to states under the Patient and State Stability Fund provided for in the AHCA, it is unclear whether there will be sufficient funding available under state high-risk pools to ensure meaningful access to coverage for all affected high-risk individuals. Prior to the enactment of the ACA, numerous states tried to operate high-risk pools, but most of them struggled with inadequate funding and various operational issues. Nevertheless, the extra funding provided by the Upton Amendment was critical to win enough support for the modified AHCA by more moderate Republicans in the House.

What is next?

The bill will now move to the Senate where Republicans can only afford to lose at most two votes, and various conservative and moderate Republican Senators have expressed concerns about the AHCA as it moved through the House. Also, in order to pass in the Senate with a simple majority, the AHCA will need to be passed under strict budget reconciliation rules. Some of the provisions added to the AHCA may not satisfy those rules and might need to be eliminated. Obtaining a score from the CBO is another requirement under the budget reconciliation rules. In turn, public support for the bill may weaken when it is re-scored by the Congressional Budget Office (CBO) and the projected increase in the number of uninsured people relative to the ACA is released.

As a result, it is anticipated that significant changes to the AHCA will be made by the Senate, or a completely new ACA repeal and replace bill will be introduced in the Senate. Nevertheless, there will be significant political pressure on Senate Republicans to pass some type of legislation that takes the first big step toward dismantling the ACA.

At the same time, employers need to keep in mind that the primary focus of this first phase of the repeal and replace effort is directed toward the individual and small group health insurance markets. In particular, the goal appears to be to make these markets more attractive to health insurance carriers by enabling them to sell coverage that is less robust and less expensive to younger healthy individuals. Aside from the effective repeal of the employer shared responsibility “play or pay” mandate, and eventual reduction in the ACA reporting requirements, the modified AHCA will not have a significant direct impact on most employer-sponsored health plans in the large group (more than 50 employees) market.

Since identical bills must be passed by the House and Senate before any ACA repeal and replace legislation can be signed into law by President Trump, employers should expect the healthcare reform debate to continue well into the summer. In the meantime, employers should continue to operate their group health plans consistent with existing law, and exercise caution in trying to plan for the future based on what is included in the modified AHCA that passed in the House.