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What Happened to Health Care Reform and Where is the Department of Labor Headed?

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Republicans hoped to mark the seventh anniversary of the Affordable Care Act's (ACA) enactment by passing legislation in the U.S. House of Representatives to dismantle it. Instead, facing the failure of a bill on the House floor despite President Trump's lobbying push, GOP leadership pulled the legislation from consideration.

The failure to pass the American Health Care Act (ACHA) (H.R. 1628) in the House was a defeat for Republicans who vowed for seven years to "repeal and replace" the sweeping law and replace it with a dramatically different vision of health care reform. Even after modifications were made to try to secure the votes of both GOP conservative and moderate factions, the bill fell short of the 216 votes needed for passage. Rather than lose by a relatively large margin and force their members to take what was seen as a futile vote, Speaker of the House Paul Ryan announced that he was pulling the bill and moving on to other issues. If enacted, the ACHA would have addressed two of the most vexing provisions for employers by eliminating the "employer mandate" penalties and further delaying the "Cadillac" tax on high-cost employer-sponsored health plans until 2026. Instead, the ACA remains the law of the land and employers and other stakeholders will now have to look to regulatory action and perhaps other legislative vehicles for at least partial relief from the ACA's requirements.

The Rocky Road of the ACHA

A Congressional Budget Office (CBO) report concluding there would be 24 million fewer insured by 2026 under the Republican House bill than under the ACA, coupled with intra-party division, doomed the GOP repeal and replace bill. The House Republican bill took aim at the cornerstones of the ACA's efforts to expand health insurance coverage – the premium tax credit and Medicaid expansion. The bill would have transitioned

Medicaid to a "per-capita allotment" and allowed states the option of instituting a Medicaid work requirement for nondisabled, nonelderly, non-pregnant adults as a condition of receiving coverage. However, the ACHA would have kept the ACA exchanges in place. The loss of coverage for millions was an issue for many moderate Republicans, and the failure to completely eliminate the exchanges and subsidies was an issue for Freedom Caucus Republicans.

Without any Democratic support, Republicans could afford to lose only 22 members of their own caucus. The version of the legislation approved by House committees and incorporated into a Budget Committee reconciliation bill was met with criticism from centrist Republicans—who worried the bill went too far and too fast to repeal the ACA—and from more conservative Party members, who thought the ACHA did not go far or fast enough.

A package of policy changes was further modified in an effort to salvage it. House Republican leadership and the White House had a fine line to walk to secure the support of one group without losing that of the other. In a last-minute concession to members of the House Freedom Caucus, the bill was changed to require states to determine essential health benefits, beginning in 2018, for purposes of the premium tax credit. Members of the House Freedom Caucus had been pushing to eliminate the requirement for individual and small group health plans to offer "essential health benefits" and the other ACA insurance market reforms, including the popular requirement to provide dependent coverage for children up to age 26 and prohibition on preexisting condition exclusions. But, this change to the essential health benefits requirement, while not enough to satisfy members of the Freedom Caucus who demanded repeal of the other ACA insurance market reforms as well, was a bridge too far for a number of Republican moderates. A full-court press by House leadership and the White House was not enough to salvage the years-long effort by Republicans. Even if the House bill had passed the House, it would likely have been dead-on-arrival in the Senate, forcing Senate Republicans to come up with the daunting task of crafting a bill that could secure the support of its own diverse caucus.

Notably, although touted as a "repeal and replace" of the ACA, the ACHA would not have repealed the ACA in its entirety. Drafters attempted to use the budget reconciliation process to enact their health care plan, which has the advantage of requiring only a simple majority vote in the Senate, instead of the 60 votes needed to avoid a potential filibuster. The limitation of using this process, however, is that strict procedural rules limit the type of provisions that can be included in a reconciliation bill to budget-related matters—those that change federal spending or revenues. Accordingly, the ACHA would have zeroed out the penalties of the employer mandate effective January 1, 2016, but would not have repealed the statutory mandate language itself. In addition, it would not have repealed the ACA's complex and unpopular employer health care reporting requirements and penalties. Moreover, the final version of the ACHA would have delayed, rather than repealed, the Cadillac tax.

Because certain provisions of the ACA could not be repealed or modified through a reconciliation bill, the ACHA had been characterized by congressional Republicans as one of three "buckets" to effectuate their health care plan. The other two buckets would have been administrative action and standalone legislation that advances through so-called "regular order" – meaning that it would need 60 votes to overcome a potential Senate filibuster.

Other Ways to Advance Health Care Reform

With the demise of the effort to repeal and replace the ACA through the reconciliation measure – at least for now – critics of the ACA are looking for other avenues to effectuate change. On the administrative front, President Trump issued Executive Order 13765, allowing the Secretary of Health and Human Services (HHS) and the heads of all other executive departments and agencies "to waive, defer, grant exemptions from, or delay the implementation" of provisions or requirements of the ACA that would fiscally burden any state or impose a cost, fee, tax, penalty, or regulatory burden on individuals, families, health care providers, health insurers, patients, recipients of health care services, purchasers of health insurance, or makers of medical

devices, products, or medications. The executive order also allows the HHS Secretary and other agency heads to provide greater flexibility to states and cooperate with them in implementing health care programs. In the absence of legislative action to repeal or modify the ACA's requirements, the regulatory process takes on added significance. However, the extent to which the administrative process can and will be used to reduce the ACA's burden as the executive order directs remains uncertain.

Included in the third bucket of standalone legislation was H.R. 1101, the Small Business Health Fairness Act of 2017, which would allow small businesses to join together through association health plans, which the House passed on March 22. The prospect of this bill and other standalone legislation faced a likely defeat in the Senate.

After pulling the plug on the ACHA vote, Speaker Ryan and President Trump announced that they were moving on to other items, namely tax reform. The prospect of passing comprehensive tax reform will no doubt become more complicated after the demise of the ACHA. As for what is next for the ACA, signals are that the Republican repeal and replace effort may not be dead. The White House was reportedly meeting with members of both the House Freedom Caucus and moderates to try to salvage the bill. Even if the ACHA were to be further amended to pass the House, however, the modifications made to the legislation to secure passage in the House would make its road to passage in the Senate even more difficult.

What does this mean for employers? It means that the ACA – and its employer mandate, reporting requirements, Cadillac Tax and other requirements – remains the law of the land. In the absence of comprehensive ACA repeal and replace legislation, employers will look to administrative action to try to find relief from these burdens. But, regulators could face statutory constraints that limit the scope of their changes. Bipartisan areas of compromise may be possible, for example, to further delay the Cadillac tax. At the same time, different risks to employer-sponsored health coverage may emerge. A cap on the tax exclusion for employer-sponsored plans remains an attractive source of revenue to pay for other legislative policies. According to the CBO's report on the ACHA, roughly two million fewer people, on net, would enroll in employment-based coverage in 2020 under the bill, and that number would grow to roughly seven million in 2026. If Republicans fail to resurrect their ACA repeal and replace bill, this figure becomes merely academic. Even under the ACA in its current form, questions about its impact on employer-sponsored health coverage remain.

Regulatory Repeal

Although the House's effort to repeal and replace the ACA dominated the headlines, a number of other notable workplace policy developments occurred in March. Congressional Republicans turned again to the Congressional Review Act (CRA) to block several controversial rules issued in the waning days of the Obama administration. Resolutions of disapproval under the CRA, if passed by Congress and signed by the president, not only nullify a regulation, they prohibit an agency from reissuing the rule in substantially the same form absent congressional action.

On March 27, President Trump signed a joint resolution of disapproval (H.J. Res. 37) under the CRA to nullify the rule implementing Executive Order 13673, Fair Pay and Safe Workplaces, otherwise known as the "blacklisting" rule. A month after passing the House, the resolution narrowly passed the Senate on March 6 in a 49-48 vote. The Fair Pay and Safe Workplaces Executive Order and implementing regulations would have required federal government contractors to disclose adverse findings and decisions with respect to their compliance with enumerated labor laws, which could then be used as a basis for denial of a contract. The rule also included pay transparency requirements and a prohibition on pre-dispute arbitration agreements. A Texas federal district court had already issued a preliminary injunction blocking all but the pay transparency requirements. Signature of the CRA resolution by President Trump not only blocks all provisions of the rule, it also prohibits future administrations from issuing another blacklisting rule substantially similar to the one just nullified.

On April 3, President Trump signed another resolution under the CRA invalidating an Obama administration

regulation. H.J. Res 83 invalidates the regulation issued by the Occupational Safety and Health Administration (OSHA), which made recordkeeping requirements a continuing obligation and thereby extending the statute of limitations for OSHA to issue citations for recordkeeping violations from six months to five years. The controversial "Volks" regulation, titled "Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness," was issued on December 19, 2016, and became effective on January 18, 2017.

Another Department of Labor rule was the subject of a CRA resolution. H.J. Res 67, which blocks a rule by the DOL's Employee Benefits Security Administration regarding savings arrangements established by qualified state political subdivisions for non-governmental employees, was passed by Congress and awaits the president's signature.

The clock is winding down on revoking additional "midnight" regulations of the prior administration through the CRA process. Congress has 60 session days after a rule is submitted to act on a resolution of disapproval. The clock resets at the beginning of a new Congress if there are fewer than 60 session days left in the prior Congress when the rule is submitted. Thus, the window is closing for Congress to use this mechanism to overturn rules issued at the end of the Obama administration. With an upcoming two-week recess and the looming battle over government funding, floor time for consideration of additional CRA resolutions – particularly in the Senate – is extremely tight.

Happenings at the Supreme Court

This timeline may become even more tight and challenging given Senate Republicans' resorting to the "nuclear option" to clear the way for confirmation of Neil Gorsuch to the Supreme Court. Lacking votes to overcome a Democratic filibuster, Senate Republicans changed the Senate rules requiring only a majority vote to end debate on a Supreme Court nomination, instead of the previously required 60 votes. When they were in the majority, Senate Democrats made a similar rules change with respect to executive branch nominations to lower courts, but left the 60-vote threshold intact for Supreme Court nominees. The latest rule change by Republicans does not alter the rules for consideration of legislation, meaning that 60 votes will still be needed to end debate on legislation. However, bipartisan support for legislation in the wake of the approval of Justice Gorsuch seems even more difficult.

As the White House seeks to fill additional slots in the administration subject to Senate confirmation, the Supreme Court issued a decision on March 21 constraining the appointment of individuals to serve in an "acting" capacity. In its *NLRB v. SW General* decision, the Supreme Court affirmed the D.C. Circuit's holding that Lafe Solomon, who was appointed by former President Barack Obama to serve as acting general counsel to the NLRB in June 2010, was prohibited by the Federal Vacancies Reform Act (FVRA) from continuing to serve in that role following his January 5, 2011 nomination to the general counsel position. The holding applies only to unfair labor practice complaints issued between January 5, 2011 and November 4, 2013 by Solomon or pursuant to his authorization, and only if the employer timely raised a challenge to Solomon's appointment under the FVRA.

Department of Labor

More than two months after the inauguration, the Department of Labor remains without a Secretary, let alone all-important assistant secretaries to head its agencies. However, Alex Acosta took an important step closer to confirmation after he was approved by the Senate Health, Education, Labor and Pensions Committee on March 30. His nomination now moves to the full Senate for consideration, where his confirmation is expected.

Acosta has served in three prior Senate-confirmed positions—as a Republican member of the National Labor Relations Board, as an assistant attorney general for the Justice Department's Civil Rights Division, and as U.S. Attorney for the Southern District of Florida. He currently serves as dean of the Florida International University's law school. The Committee vote to approve Acosta, which broke upon party lines, came a week after his nomination hearing. In a press statement upon Acosta's confirmation hearing, Senator Lamar Alexander (R-TN), Chairman of the HELP Committee, stated that the "Labor Secretary and Congress's goal is to create an environment for American workers to succeed in a rapidly changing workplace and that harmful Obama-era labor regulations have only made

it harder for Americans to create, find, or keep good-paying jobs."

Senator Alexander cited the Obama administration's overtime, joint employer, persuader, and fiduciary regulations, as well as the ACA and the Equal Employment Opportunity Commission's revised EEO-1 form, claiming, "one rule after another has stacked a big, wet blanket of costs and time-consuming mandates on job creators, causing them to create fewer jobs."

Once confirmed, Acosta will have a full plate with reviewing and determining the path forward on these and other regulations issued by DOL during the Obama administration. To carry out these tasks, the incoming Secretary will be guided by directives from the White House on regulatory review. The White House Chief of Staff recently issued a memorandum directing agencies to temporarily postpone the effective dates of recent rules not yet effective to give the new administration a chance to "review[ ] questions of fact, law, and policy they raise." The memorandum further instructs agency heads that: "[i]n cases where the effective date has been delayed in order to review questions of fact, law, or policy, you should consider potentially proposing further notice-and-comment rulemaking."

The Secretary will also be guided by Executive Order 13771 issued on January 30, which requires two existing regulations be withdrawn for every new rule issued, as well as Executive Order 13777, entitled "Enforcing the Regulatory Reform Agenda." This order sets forth the Trump administration's goal to "alleviate unnecessary regulatory burdens placed on the American people" and calls upon each agency to establish a Regulatory Reform Task force to evaluate existing regulations and to make recommendations regarding their repeal, replacement or modification.

One policy issue facing the incoming Secretary of Labor—and sub-cabinet level positions—is the changing nature of the workforce itself and the technology-driven expansion of the so-called gig or sharing economy. On March 3, the DOL's Bureau of Labor Statistics (BLS) submitted to the White House Office of Management and Budget (OMB) for approval a revised proposal to add new questions to the Contingent Worker Supplement. These additional questions "will explore how the Internet and mobile device applications have changed the type of work people do and how they are paid." While applauding the DOL and BLS' effort to gather more data and recognizing its importance to sound policymaking, Littler's Workplace Policy Institute submitted comments urging BLS to craft questions that paint a more holistic picture of the sharing economy and the motivations and needs of its workforce.

With the confirmation of the Secretary of Labor in sight and other key nominations on the horizon, the months ahead should begin to reveal the path the Trump administration is going to take on these and other workplace policy issues – a path likely to be quite different from that of the prior administration.