



News and Industry Insights

April 2017

Insight on the AHCA: Failure to Launch

Since Speaker Ryan pulled the American Health Care Act bill on March 24, many are wondering what happened and how it will affect the healthcare benefit industry. Below is our take on why the bill was not passed and what the immediate future holds. This is based on our “inside the beltway” contacts and others in the industry that work closely with members of Congress and are primarily focused on self-funded health plans:



The failure of AHCA to rally enough of the Republican majority votes to get it through the House was no surprise. There is already lots of finger pointing. It was a miscalculation and a no-win challenge. We in the health care benefits industry know “There is not enough money in the entire world to pay for all the health coverage people believe they deserve...for little or no cost!” Moreover, “You can’t take candy away from a child after giving it.”

GOP Reality time: The House had easily passed dozens of repeal-of-ACA bills in recent years with full support of the Republicans who more recently were not in favor of the AHCA. That means the votes were there if, for example, they had simply proposed the 2015 version again. It may be that Republicans back then felt it was an easy hollow vote, and the optics were good because President Obama would not sign anything. With President Trump eager to sign anything called ACA Repeal and Replace, it was suddenly reality time. Congressmen saw political opportunity, but they also realized that they would be the target in the 2018 elections for any “harm” to any American from the new law.

The Politics: Remember when we criticized Nancy Pelosi in 2010 for telling the House regarding the ACA, “We have to vote on the bill in order to see what’s in it”? That was actually true, and it is essentially what House Republicans were told before the vote. The AHCA bill was a virtual tweak of ACA (thus dubbed “Obama Light”). It was far from the “rip ACA out by its roots” campaign that most Republicans and Trump promised voters. Politicians also realized that Repeal and Replace would be a one-shot event. The AHCA proposed implementation in three stages. Massive changes of the regulations in Stage 2 were unlikely because they would be mired in endless lawsuits. The changes needing

legislation with a 60% majority vote in Stage 3 was also unattainable. Stage 3 contained the items most desired by conservatives. That is why those politicians who wanted a true Repeal and Replace, such as conservatives, were against the AHCA and didn't want to waste the one chance on a watered-down remake of ACA.

So many changes were being added and changed to the AHCA right up until it was pulled from voting that no Congressmen knew, much less understood, what all was in it. They also probably saw that AHCA had a 17% nationwide approval rating and was disliked by most health organizations. Should they put their political careers on the line and use up the one good shot voting for a bill with ambiguous and unattainable objectives, and not popular with voters and donors?

Theory and Practice are two different things: The health care industry is probably relieved. AHCA was a hodge-podge in many ways. It was a false concept. Repeal and Replace was never going to be part of full repeal of the **424 parts** of ACA. Repeal and Replace, especially AHCA, was actually only a tweak of ACA. There were too many provisions that sounded good in theory to self-assigned "experts". However, these experts are not down in the trenches and do not know the effects of human nature and unforeseen new problems that would be caused. Cross-state-border insurance and HSAs were envisioned as cure-alls.

Another red flag was the talk about more power and new things states would be able to do. Expecting the employer community to think only within the boundaries of one state is not realistic. Most major cities are within commuting distance of other states. There was a Congressional Research Service study several years ago that estimated 81% of US employers have some form of multi-state personnel situation (such as commuters, retirees, out-of-state dependents, etc. Tucker Administrators has many clients whose employee base straddles North and South Carolina, and we have employees residing in both states.

ERISA preemption issues: In a related matter, ERISA preemption would probably not supersede all that mentioned in the above paragraph. The authorizations for expanding state powers, or the already-existing ACA Section 1332 waivers for states to come up with their own health laws and programs in lieu of ACA (which the Trump Administration plans to encourage) all come with federal law authority. ERISA preemption does NOT preempt other federal laws. It only preempts state insurance law. Therefore, the concept of giving more power to the states that is promoted in the AHCA would be difficult for ERISA plans, and perhaps become an untenable chore for having employer-wide benefit plans. For example, most state laws apply to "any resident of the state of", so an employer of a plan might have to conform to a dozen or more state bureaucracies, and some states might have mandatory enrollment, thus the employer plan may lose the people from those states to some state system.

Legislators not familiar with self-funding: Another concern about AHCA and others creating a new health coverage system is that they will throw the baby out with the bath water. The problem health reform is trying to save or improve is the individual coverage, and that is what policy makers are more focused on. However, the reformers tend to bring in employee benefit plans. The employee benefits system, especially self-funded and ERISA plans, is one of the great success stories of American history. For example, until our industry educated the drafters of ACA on the concept of self-funding health benefits, they were thought of as "insurers" with all the limits, penalties and other rules designed for insurance operations. Thankfully, lumping self-funded plans in with insurance plans was scrapped.

Transparency: Intentional blindness to health cost and transparency is the biggest disappointment of AHCA and seemingly all of the key reformers. Many of the key people are doctors or come from health provider backgrounds. To them, cost transparency has traditionally been an uncomfortable discussion. Nevertheless, without an open, candid discussion regarding the solutions to costs and transparency, health reform is just rearranging deck chairs on the Titanic.

Since the ACA remains, an ultra-important cost transparency option survives. There exists in the ACA a provision mandating hospital cost transparency, with HHS in charge of regulation. Many in our industry spent years of intensive negotiation and education with key personnel to get the Obama HHS to implement their own law. However, government health

agencies appear to be geared more to the provider mindset. When the personnel structure of the new Administration is settled in at HHS, this might be a chance for the healthcare benefits industry to achieve the biggest prize possible in solving health coverage problems.

What are big-picture ramifications post-AHCA?

- Less flexibility in changing how ACA provisions and regulations are implemented.
- Most regulation changes would need to be done via Executive Order. However, Executive Orders only last unless/until a future President wipes them away or change them. Because there is no new Repeal and Replace law, it will be harder to make significant changes...and, of course, many lawsuits to challenge any action. For example, watch if/how changes to the cost-sharing (subsidies) are handled.
- The Republican Majority is now, de facto, a majority in name only. It is now a split party, roughly between conservatives and the traditional hierarchy. Bitterness will probably grow, with more challenges within 2018 Republican primaries. Don't assume there will routinely be unified Republican majority votes. There is more talk these days about creating a conservative third party.
- If Trump reaches out to Democrats to work a deal to "improve" ACA (instead of Repeal and Replace), the divided Republican label will also lose value. Trump will need some help from the Democrats to get some changes (in the regulations). Of course, the quid pro quo to Democrats will be things that anger Republicans, especially conservatives.
- Tax reform and other big Trump goals will also be impacted. A President needs wins. This has been a loss. Media and Democrats will be eager to apply the label of ineffective loser often to every action. Comprehensive tax reform was actually supposed to be the most important achievement of the Trump administration. He now goes into that battle wounded. One thing is that he was counting on was the few-hundred-million dollars of savings that AHCA and Repeal and Replace was going to yield. Now that money is not there, and ACA is a money-drain.

Good news!

Plans are growing. The optimistic economy since Election Day is generating a significant increase in full-time employment, mostly from part-time to full time. This, of course, means more lives-per-plan. In addition, what might have been a too-small prospect may be growing. It is probably worthwhile for benefit consultants to remind clients and prospects to check their full-time employee count. With the ACA Exchanges (which will presumably remain, along with the law) offering less benefit for more premium, the employer can step up their benefit package by offering a quality employer plan.

Since AHCA somewhat blew up in Congress' face, it is doubtful that they will want to rush back into that meat grinder. That means reviewing and tweaking regulations is where the real health action will be.

Tucker Administrators is here to help you navigate through all aspects of healthcare reform.

[Visit our website](#)

