HEALTH CARE REFORM ARTICLE

This article was reprinted with permission from the June 23, 2017 edition of the HLbytes — The weekly bulletin from the Health Law Section of the American Bar Association.

Is the Senate's "Better Care" a Better Way to Repeal Obamacare?

Authored by: Denise E. Hanna, Locke Lord Partner and Co-Chair of the Firm's Health Care Practice

June 26, 2017

On June 26, 2017, the U.S. Senate leadership released a "discussion draft" of The Better Care Reconciliation Act of 2017 (the "Better Care Act") — i.e., legislation to repeal and replace the Affordable Care Act, better known by its critics and supporters as Obamacare.

When the U.S. House of Representatives passed the American Health Care Act ("AHCA") on May 4, 2017 by a thin margin, the Senate seemed to publicly dismiss the House's legislative effort. However, the Senate's legislative proposal, the Better Care Act, follows much of AHCA's blueprint for repealing and replacing Obamacare, but with a softer landing.

Some of the key features under the Better Care Act include:

Pre-existing conditions
Health insurers would be required to cover individuals with pre-existing conditions, without additional charge. However, states could opt out of requiring their insurers to cover Obamacare's essential health benefits. As a consequence, less comprehensive insurance policies may not cover certain conditions or treatments.

Medicaid expansion
Funding for individuals who became newly eligible for Medicaid under Obamacare would continue through 2021 (a year longer than under AHCA).

Medicaid funding
Funding for Medicaid eligible individuals would be capped by the federal government; and states would be forced to be paid either a block grant or a per capita amount for its residents who qualify for Medicaid (under AHCA, only option was per capita spending).

Stabilizing the exchanges
The Senate's bill appropriates $50 billion over four years to help stabilize the Exchanges.

Premiums subsidies
The advanced subsidies to help individuals and families pay their health insurance premiums purchased on the Exchanges would remain in place, mostly. However, in 2020, the upper income limit on subsidies would be reduced from 400% to 350% of the federal poverty limit (AHCA replaced subsidies with age-based tax credits that had a disproportionate effect on older Americans).

Cost-sharing reductions
The additional advanced subsidies to help individuals and families reduce the overall costs (particularly, for out-of-pocket spending) of purchasing "silver" level plans on an Exchange would remain in place until 2019 (same as AHCA).

Taxes on health industry participants and high wage earners

The fees payable by health industry participants and taxes payable by high wage earners to help fund Obamacare coverage expansion and subsidies would be repealed consistent with AHCA.

Coverage mandates

The individual mandate tax would be reduced to zero and the employer mandate penalties would be suspended consistent with AHCA.

Cadillac tax

The excise tax on "rich" employer-sponsored health benefit plans would be further suspended until 2025 consistent with AHCA.

Planned Parenthood

The Better Care Act, as with the House-passed bill, would defund Planned Parenthood for one year.

If passed by the Senate and then by the House, the Better Care Act may provide more immediate stability to the individual health insurance market than AHCA would have. Reason being, the Better Care Act generally keeps intact longer (or as long) Obamacare's premium subsidies, cost-sharing reductions and Medicaid expansion, and provides additional funding to help stabilize the Health Insurance Exchanges. This greater stability in the insurance marketplace also should provide some short-term relief to health care providers who fear an immediate rise in the number of uninsured. Still, there is a practical concern that the portions of Obamacare which this Congress may repeal or revise eventually could usher back an era of pre-Obamacare policies where it was difficult or costly for individuals, without employer-sponsored benefits, to purchase comprehensive health insurance, especially after they had become ill or women had become pregnant.

Still, thinking optimistically, should the Better Care Act or something similar become law, the longer Obamacare phase-out period could have unintended positive consequences. The additional time and election cycles may provide an opportunity for bi-partisan and private sector efforts to help solve one of the knottiest conundrums in trying to reform the health insurance marketplace. That is, how do we encourage a healthy and robust health insurance marketplace where healthy and other individuals retain the freedom to choose less insurance coverage and/or limited benefits in exchange for lower premiums while, at the same time, making comprehensive insurance coverage available to individuals and families that want adequate coverage for chronic and acute conditions at an affordable price.

Some would argue that Obamacare sacrificed a level of freedom in exchange for a framework whose goal was to attain comprehensive health insurance coverage for all. Others would argue that they would prefer the freedom and peace of mind to choose comprehensive coverage for themselves and their family. Hopefully, the Better Care Act or any other successor legislation that becomes law does not stand in the way of rational health industry actors to continue practical and commonsense reforms of the health insurance marketplace. After all, health care quality improvement, population health and cost transparency and savings — which some argue should be this Country's paramount concerns — cannot be achieved, let alone pursued, if tens of millions of Americans have no reasonable means of paying for their health care.

With that having been said, the Better Health Act is still far from law. A score by the Congressional Budget Office (CBO) and, at this writing, four Senators who presently are withholding their support stand in the way of the Better Health Act proceeding along its legislative path.

Denise E. Hanna | 202-220-6992 | dhanna@lockelord.com