

THE OUTLOOK FOR HEALTHCARE ISSUES IN CONGRESS

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Democrats made defending the Affordable Care Act and expanding Medicare key pledges during last year's congressional campaigns, and those issues helped them win control of the House in the new 116th Congress. Senate Republicans increased their majority by two seats to a total of 53, but Democrats retain substantial leverage in a chamber where 60 votes are required to advance most legislation.

Looking ahead to the 2020 elections and spurred in part by December's District Court ruling that the now penalty-free individual mandate is unconstitutional and, as a result, the entire ACA should be struck down, House Democrats plan to keep their ambitious healthcare agenda front and center this year with hearings and legislation.

An early start to the campaign season will leave little time for legislating, however, and Democrats must deal with some substantial intra-party divisions over policy details, such as how to expand coverage through Medicare. Moreover, much of what they may be able to move through the House will stall in the GOP-led Senate. Republicans also lack a coherent policy strategy since failing to repeal and replace the ACA, though they effectively repealed the law's individual mandate with the 2017 tax cut law.

While all this may make major health-policy changes unlikely in 2019, any measures that might be signed by the president will likely focus on further delaying the controversial Cadillac Tax and other ACA taxes, and on affordability issues such as drug pricing and "surprise" medical bills from out-of-network providers.

Here's my take on the most important legislative issues for employers in 2019.

ACA Insurance Market Modifications Partially in response to the Federal District Court ruling (*Texas v. United States*), the House is set to move quickly to protect the ACA's requirement of guaranteed-issue, prohibition on pre-existing condition exclusions and other insurance-market reforms. These proposals are also expected to seek more generous subsidies for lower-income individuals to purchase public Marketplace health coverage, increase open-enrollment on rules allowing non-ACA-compliant plans, such as short-term limited-duration insurance policies.

Some centrist GOP lawmakers will likely offer their own legislation to guard consumer protections, and some moderate Republican senators may look to revive last year's bipartisan efforts to stabilize individual and small-group insurance markets. With the law's fate in legal limbo, however, there is little incentive for the parties to come together.

Cadillac Tax Repeal

The effort to fully repeal the law's Cadillac Tax on "high-cost" employer-sponsored health plans will continue, though the outlook is uncertain. Repeal legislation in the last Congress drew bipartisan support from nearly a third of the Senate and more than 300 House lawmakers, but there's little

agreement on how or even whether to replace the resulting lost revenue. An effort late last year by House Republicans to delay the tax for one additional year—until 2023—without a revenue offset fizzled out. The proposal was projected to cost \$13.6 billion by the Joint Committee on Taxation. Congress delayed the onset of the tax from 2020 to 2022 in early 2018 as part of budget legislation. Lawmakers could next address the tax as part of major budget negotiations over how to stave off sequester-level spending caps set to return on October 1. Any deal could be a vehicle for other health-related items as well, such as drug-pricing legislation.

DRUG PRICING IS AN AREA WHERE DEMOCRATS AND REPUBLICANS COULD FIND COMMON GROUND

Drug pricing is an area where Democrats and Republicans could find common ground, and leaders of some of the main Senate and House healthcare committees are concerned about the high cost of drugs and are encouraging generic drug development. The two parties could agree, for example, on bipartisan proposals from the last Congress that would prevent brand-name drug companies from paying potential generic competitors to delay their product's market entry, as well as deter those brand-name drug companies from blocking the sale of samples that generic drug makers need to get their products approved.

Agreement on more ambitious proposals will be difficult but possible. Key Democratic priorities include allowing the Medicare Part D program to negotiate drug prices, permitting importation of less-expensive drugs from abroad, and basing the price

of drugs in the U.S. on prices paid in other major global economies. Like President Trump, new Senate Finance Committee Chairman Charles Grassley (R-IA) has criticized rising drug prices and may align with Democrats on some issues. Grassley is opposed to letting the federal government negotiate drug prices and basing U.S. prices on what other countries pay, but has teamed with Democrats to sponsor legislation allowing importation of certain drugs from Canada and wants to step up oversight of drug-pricing issues.

Congress and President Trump enacted legislation last year to ban “gag clauses” that stop pharmacists from telling customers they could save money by paying for a drug outside their plan rather than using their insurance benefits. The Administration is also aggressively pursuing a number of regulatory reforms aimed at reining in drug prices.

Congress may also consider revising or reversing changes to Part D coverage gap (the donut hole) made in February 2018 budget legislation. That bill closed the donut hole one year earlier (in 2019) than originally scheduled, saving seniors and health insurers money but shifting much of the cost to brand-name drug makers, who will urge Congress to roll back the change. Senior groups and insurers will push back, however, and how lawmakers respond remains to be seen.

HSA Enhancements

A handful of employer health policy priorities embraced in legislation in the previous Congress face an uncertain future. These include more flexible rules for Health Savings Accounts and high-deductible health plans.

An extensive Republican package of HSA reforms that passed the House last year included bipartisan provisions to promote value-based care. These included measures, however, appear to have been caused to allow more pre-deductible coverage in HSA-qualifying HDHPs for people with chronic conditions and to permit pre-deductible use of telemedicine services or employer onsite medical clinics without risking HSA eligibility. It's not clear if lawmakers will revisit HSA issues this year, though employers will continue to advocate for these and other updates to the rules.

In addition, Trump Administration officials say they plan to issue guidance expanding the types of preventive care that can be covered on a pre-deductible basis in HSA-qualifying HDHPs.

ACA Employer Mandate and Reporting Relief

Employers will also ask lawmakers to repeal the employer mandate, arguing that it no longer serves its original purpose of supporting the now effectively repealed

individual mandate. Such a major change to the law, which would likely be scored as a large revenue loss, probably won't win support from many Democrats, however. Nor would legislation offered by Republicans last year that sought retroactive relief from employer mandate assessments (that change was projected to cost \$26 billion by the Joint Committee on Taxation), which concerns some Democrats about potentially rewarding some non-compliant employers.

The bid for employer mandate relief has been driven largely by problems that have plagued IRS enforcement. In 2017, the Service began enforcing the mandate by mailing 226J letters to employers notifying them of proposed 2015 penalties. We are now seeing 226J penalty letters for the 2016 calendar year.