

December 24, 2019

Repeal, Repeat, Remand – Ho Ho Hum?

The year ended with a lot of activity in the health and welfare benefits space, although much of that activity results in things continuing as they were for 2019.

2020 Federal Spending Bill

Congress passed the [fiscal year 2020 spending bill](#) (the “Spending Bill”) last week, and it was signed by the President on December 20, 2019. The Spending Bill contains several provisions affecting health and welfare benefit plans, with certain key items summarized below:

Cadillac Tax

The Affordable Care Act’s (ACA) excise tax on high cost coverage (better known as the “Cadillac Tax”) was originally planned for 2018. It has been delayed twice – first to 2020 and again to 2022 – and will now never see the light of day. The Spending Bill permanently repeals the Cadillac Tax.

The Plot Thickens – A significant revenue raising mechanism under the ACA was the combination of the Cadillac Tax and the employer shared responsibility payments (ESRPs). As an employer’s Cadillac Tax liability [inevitably] increased, the employer would eventually find it less expensive to opt out of providing health coverage to its employees and pay an ESRP instead. With no Cadillac Tax to help drive employers toward the ESRPs, the ACA’s long-term funding has taken a significant hit.

Health Insurance Tax (HIT)

The ACA’s HIT requires fully insured medical, dental and vision plans to pay an annual fee, which is typically baked into the plan’s insurance premiums. The HIT has been suspended for roughly half the years it has been in effect. The Spending Bill repeals the HIT entirely as of January 1, 2021. The HIT is still in effect for 2020, mainly because the rates for 2020 were already approved by state departments of insurance and incorporated in 2020 insurance premiums. On average, the HIT has been responsible for an increase of 2.5 – 3% in premiums for the years it has been in effect. We believe premiums are unlikely to actually decrease with the HIT’s repeal, but the rate of premium increases should be reduced for 2021.

Medical Device Tax

The ACA’s medical device tax is repealed as of January 1, 2020. This was a tax on the sale of certain medical devices by the manufacturer or importer of the device and resulted in modest increases to plan costs.

Qualified Transportation Fringe Benefit for Non-Profits

The 2017 Tax Cuts and Jobs Act [required nonprofit companies](#) to include the cost of qualified transportation benefits in their unrelated business income (UBTI). The Spending Bill repeals this requirement retroactively for amounts paid or incurred after December 31, 2017.

Note: We provided an overview of the [status of qualified transportation fringe benefit plans](#) earlier this year. It remains current minus the references to UBTI for nonprofits.

Patient-Centered Outcomes Research Institute (PCORI) Fee

This fee on fully insured and self-insured health coverage is due annually on July 31st and is calculated by multiplying the average number of covered lives for the policy year by an indexed dollar amount. The PCORI fee was scheduled to end in 2019 (2020 for many non-calendar year plans). In a surprise move, the Spending Bill extends the PCORI fee to 2029 (2030 for many non-calendar year plans).

Fifth Circuit Ruling in Texas v. U.S.

Also in December, the 5th Circuit Court of Appeals [agreed](#) that the ACA's individual mandate is unconstitutional without a corresponding tax penalty. However, the 5th Circuit remanded the case back to the District Court to provide additional analysis on whether this provision is severable from the ACA without declaring the entire ACA unconstitutional. If the lower courts strike down the entire ACA, we are confident the U.S. Supreme Court will hear the case. This may not occur before 2021, since the case will first need to work its way back through the District Court and 5th Circuit. If these lower courts determine the individual mandate can be severed from the rest of the ACA, the Supreme Court may decline to hear the case which preserves the current status quo.

Remember: Although the Trump Administration has appointed two new justices, the five Supreme Court justices that initially saved the ACA in 2012 are still on the bench.



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