

ACA Repeal/Replace under Trump Administration

WEB Meeting

Chicago

January 25, 2017

www.mwe.com

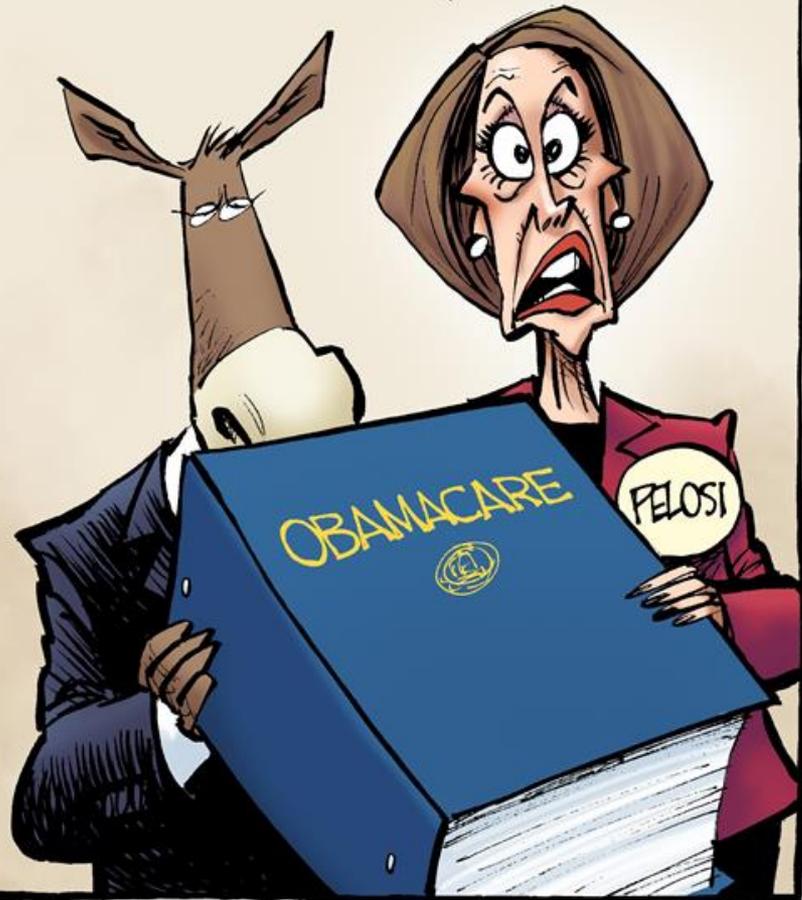
Boston Brussels Chicago Dallas Düsseldorf Frankfurt Houston London Los Angeles Miami Milan Munich New York Orange County Paris Rome Seoul Silicon Valley Washington, D.C.
Strategic alliance with MWE China Law Offices (Shanghai)

© 2017 McDermott Will & Emery. The following legal entities are collectively referred to as "McDermott Will & Emery," "McDermott" or "the Firm": McDermott Will & Emery LLP, McDermott Will & Emery AARPI, McDermott Will & Emery Belgium LLP, McDermott Will & Emery Rechtsanwälte Steuerberater LLP, McDermott Will & Emery Studio Legale Associato and McDermott Will & Emery UK LLP. These entities coordinate their activities through service agreements. This communication may be considered attorney advertising. Previous results are not a guarantee of future outcome.

- The Affordable Care Act (ACA) was enacted in 2010 to reform the health care system, increase access to health care, expand the pool of covered individuals and make changes to the health care delivery system by expanding Medicaid and enabling Health Care Marketplace Exchanges.
- President Trump and the GOP have vowed to “repeal and replace” the ACA.
- Complete repeal unlikely as many ACA changes will require a filibuster proof majority vote in the Senate (60 votes) – Republicans have 52 seats.
- Some changes can be made unilaterally through Executive action and by Republicans through Budget Reconciliation

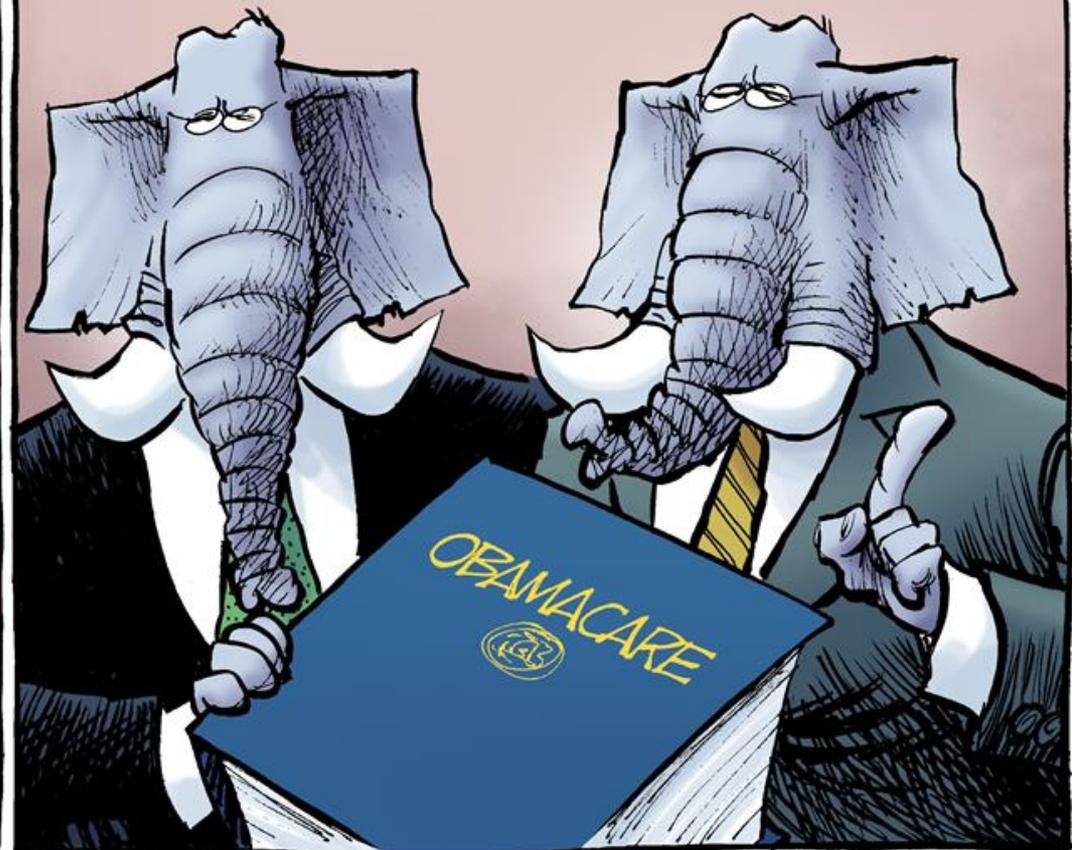
2010

WE NEED TO **PASS** IT TO
FIND OUT WHAT'S **IN** IT!



TODAY

WE NEED TO **REPEAL** IT
TO FIND OUT WHAT TO
REPLACE IT WITH!



Bill @17
THE COLUMBUS DESPATCH
CAGLECARTOONS.COM

- The ACA rules impact employer sponsored group health plans (GHP) in three main ways:
 - Taxes and Fees (PCORI, TRF, Employer Shared Responsibility, Cadillac Tax)
 - Reporting Requirements (1094 and 1095, W-2)
 - Coverage mandates/requirements
 - Coverage of Adult Dependent Children to age 26
 - Elimination of Pre-existing Condition Exclusions
 - No Lifetime or Annual Limits
 - No Excessive Waiting Periods
 - Maximum Out-of-Pocket Limits
 - Preventive Care Mandate

- Coverage Mandates/Requirements
 - SBCs
 - Coverage of approved clinical trials
 - Prohibition on “rescissions” of coverage
 - Appeals process reform and external review
 - Nondiscrimination rules for GHPs
 - Annual cap on salary reduction contributions to health FSAs
 - Essential Health Benefits

- Other ACA provisions that impact employees
 - Individual Mandate
 - Health Insurance Exchanges
 - Low income subsidies
 - Medicaid Expansion

- A special legislative process created by Congress to allow for expedited voting on bills that directly impact revenues and expenditures (i.e., taxes and spending).
- A budget reconciliation bill can be passed by a simple majority (51 votes) in the Senate and is not subject to a filibuster (which requires 60 votes to overcome).
- A budget reconciliation bill can only be debated for 20 hours in the Senate and the scope of floor amendments is very limited.
- Congress passed a partial-repeal bill in 2015 that was vetoed by President Obama. The partial repeal bill did away with the individual and employer mandates, among other things.

- Paul Ryan “A Better Way”
- Rep. Tom Price (Trump’s Proposed HHS Secretary) “Empowering Patient’s First”
- Common Themes
 - Decrease Medicaid expenditures from the federal government
 - Rein in GHP Tax Benefits – cap the amount that employers can deduct for health care costs for employees and that employees can exclude from income
 - Health Savings Account Expansion; some government created
 - Permit sale of insurance across state lines to increase competition
 - Eliminate employer and individual shared responsibility mandates and Cadillac Tax
 - Fewer coverage mandates
 - Tax Credits

- Patient Freedom Act, introduced earlier this week by Susan Collins (R- Maine) and Bill Cassidy (R. LA)
- State legislatures would have the choice of whether to keep the ACA operating in their states, complete with its subsidies, mandates and protections for people with pre-existing conditions.
- Other states could opt into an alternative plan that would provide a uniform tax credit linked to a health savings account to help people afford a basic, less comprehensive health insurance plan.
- Recognition that revenues from ACA important to fund replacement.

- Outright repeal of the ACA will require a 60 vote majority. Bills that qualify for budget reconciliation only need a simple majority vote to pass
- Congress has passed a bill that will set in motion the repeal of the ACA and provides instruction to House and Senate committees to begin reconciliation process
- Republican Congressional Leaders have vowed to send a repeal bill to Trump by the end of January
- The entire ACA cannot be repealed through budget reconciliation
- Additional legislation which requires 60 votes to pass will be required to “replace” the ACA

Tax Provisions of the ACA Subject to Repeal Via Budget Reconciliation

- Individual mandate penalty reduced to zero
- Employer mandate reduced to zero
- 40% excise tax on so-called Cadillac plans repealed (currently delayed until 2020)
 - The requirement to report the cost of employer-sponsored health plan coverage on Form W-2 cannot be repealed via budget reconciliation.
 - The excise tax may be replaced with a cap on the amount excluded from the employee's income for employer-sponsored health plan coverage.
 - Impact: An increase in employee W-2 income would increase employer payroll taxes and the employee's individual income taxes
- Increase the dollar limit on flexible health spending account contributions for Section 125 cafeteria plans (currently set at \$2,600 for 2017)

Tax Provisions of the ACA Subject to Repeal Via Budget Reconciliation

- Federal government subsidies for individuals to purchase Exchange coverage reduced to zero (likely to be phased in over time)
- Federal government “risk stabilization” payments to insurance companies reduced to zero (likely to be phased in over time)
- Unclear whether 1094/1095 Reporting will still be required
- Federal government payments to States adopting the optional Medicaid expansion reduced to zero, with Medicaid payments reformulated as block grants

“Insurance Market Reform” (Non-Tax) ACA Provisions Requiring 60 Votes to Repeal/Replace

- Coverage mandates for insured and employer self-insured group health plans:
 - Coverage of adult children to age 26
 - Prohibitions on imposing:
 - Preexisting condition exclusions
 - Waiting periods exceeding 90 days
 - Annual and lifetime dollar limits on essential health benefits
 - Rescission

“Insurance Market Reform” (Non-Tax) ACA Provisions Requiring 60 Votes to Repeal/Replace

- Additional ACA Requirements for Non-Grandfathered Plans:
 - Coverage of preventive services without cost-sharing
 - “Preventive services” include contraceptive coverage - likely to be changed by new regulations under a Trump Administration.
 - Limits on employee cost-sharing
 - Independent external review of denied claims
- Insurance Market Reforms
 - Small employer insured plans required to offer coverage of ten essential health benefits
 - Guaranteed access, affordability

Non-enforcement of Market Reform Requirements

- Enforcement of the ACA's "market reform" requirements is via an excise tax penalty imposed on the employer under Code Section 4980D
- Penalty is \$100 per affected individual, per day
- Applies to any employer (regardless of the size of its workforce) that offers a group health plan that fails to comply with the ACA's market reform requirements
- IRS could place low priority on ACA enforcement

- Insured plans must still comply with state insurance law requirements.
- Code 4980D excise tax could be reduced to zero for certain ACA violations
- Trump Administration could adopt a non-enforcement policy regarding certain market reform requirements, but enforce other popular market reforms (e.g., elimination of pre-existing conditions; coverage of adult children up to age 26)
- Constitutional Limits to Non-enforcement

- Issued January 20, 2017, it states the policy of the Trump administration is to seek the prompt repeal of the ACA.
- It orders the Secretary of HHS and heads of all other executive departments and agencies to exercise all authority and discretion available to them to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the ACA that would impose a fiscal burden on any State or 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.
- Aims to provide greater flexibility to States and to develop a free and open market for interstate commerce for healthcare and insurance.

- What does it mean? Possible Outcomes:
 - Moratorium on rulemaking
 - Withdrawal of proposed regulations
 - Suspend effective date of regulations that were issued as final but not yet effective
 - Issue new regulations (requires proposed regulations, notice for period and comment and then final regulations)
 - Increase hardship exemptions to individual mandate
 - Use courts to overturn regulations (slow process)
 - Decline to appeal *House v. Burwell* (subsidies eliminated)
 - Medicaid waivers
- Note that incoming Secretaries of HHS (Tom Price), Labor (Andrew Puzder) and Treasury (Steven Mnuchin) have not been confirmed.

- HHS could eliminate the requirement for GHPs to cover contraception under preventive care mandate
- HHS could revise definition of “essential health benefits”
- HHS could revise/not enforce 1557 rules (transgender benefits – recently case in N. District of Texas imposed a nationwide injunction with respect to transgender aspects of 1557)
- IRS could delay/revise 1094/1095 reporting requirements and extend good faith reliance
- IRS could place low priority on ACA enforcement; DOL audits would be curtailed

- Immediate repeal without replacement could destabilize the insurance markets and cause a death spiral to Exchanges
- 20 plus million Americans will lose health coverage who gained it through Medicaid expansion and Exchanges; Mayors and Governors have weighed in on their constituencies
- Taxation of Employer provided benefits will be vigorously opposed
- Proposals to revise Medicare will be vigorously opposed by groups such as AARP
- State legislation required to change state insurance laws