

LAW & POLICY GROUP | **GRIST**

## 2019 OUTLOOK FOR AFFORDABLE CARE ACT LEGISLATION

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Campaign pledges to defend the Affordable Care Act (ACA) helped Democrats 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 most legislation needs 60 votes to advance.

Looking ahead to the 2020 elections, House Democrats are holding hearings and proposing legislation to keep their healthcare agenda front and center. Bolstering the ACA has gained more urgency since a federal district court in Texas last December found the ACA's penalty-free individual mandate is unconstitutional, invalidating the entire law (*Texas v. United States* (N.D. Tex. Dec. 14, 2018)). While the ACA remains intact as appeals in that case continue, the law continues to face uncertainty.

Despite Democrats' ambitions, high-profile political and policy fights with the Trump administration, along with a crowded agenda, will leave little time for legislating. Many measures that Democrats manage to move through the House will stall in the GOP-led Senate. Republicans have yet to craft a coherent healthcare strategy after failing to repeal most ACA provisions, other than the individual mandate's penalties.

In this political climate, major ACA reforms are unlikely in 2019. Some narrower proposals with a chance of enactment include measures further delaying ACA taxes — like the controversial "Cadillac" tax on high-cost employer-sponsored health plans — or simplifying employer shared-responsibility (ESR) reporting.

### ACA INSURANCE MARKET MODIFICATIONS

Partly in response to the Texas district court ruling, the House is likely to act to preserve the ACA's guaranteed-issue protections, ban on pre-existing condition exclusions and other insurance market reforms. Democrats also want to increase subsidies to help lower-income individuals buy health coverage from the public marketplaces; boost funding for open enrollment in those marketplaces; and roll back Trump administration rules allowing non-ACA-compliant plans, such as short-term, limited-duration insurance (STLDI) policies.

GOP lawmakers are expected to offer their own legislation to safeguard consumer protections and revive last year's bipartisan Senate proposal to stabilize the individual and small-group insurance markets. With the ACA's fate in legal limbo, however, the parties have little incentive to come together.

### CADILLAC TAX REPEAL

House lawmakers have reintroduced bipartisan legislation ([HR 748](#)) to repeal the ACA's tax on high-cost employer-sponsored health plans, but the outlook is uncertain. That proposal garnered support from more

than 300 House lawmakers and nearly a third of the Senate in the last Congress. However, agreeing how or even whether to replace the resulting lost revenue remains an obstacle.

Congress first delayed the onset of this tax from 2018 to 2020, then put off the tax again until 2022 as part of last year's budget legislation ([PL 115-120](#)). 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 Joint Committee on Taxation (JCT) [projected](#) the proposal would cost \$13.6 billion. According to a May 2018 [report](#) from the Congressional Budget Office, the JCT estimates that the tax would generate \$168 billion in revenue from 2022 to 2028. Most of that revenue reflects a controversial assumption that as employers cut back generous health benefits, workers will receive higher taxable wages in return.

Without a revenue offset, the latest Cadillac tax repeal bill has to overcome House Democrats' pay-as-you-go rule, which requires a waiver to take up any legislation that's not budget-neutral. Lawmakers could next address the tax as part of major budget negotiations to stave off sequester-level spending caps set to return on Oct. 1. Any deal could include drug-pricing legislation and other health-related items as well.

### ACA EMPLOYER MANDATE AND REPORTING RELIEF

Employers will also push to repeal the ESR mandate, arguing ACA's "shared responsibility" for health coverage is moot now that Congress has effectively eliminated the individual mandate. However, repeal of the ESR mandate — which would likely carry a large revenue loss — probably won't win support from many Democrats. Last year's GOP proposal ([HR 4616](#)) to provide retroactive relief from ESR assessments could be revived but faces a steep climb. The JCT [estimated](#) that change would cost \$26 billion and left some Democrats concerned about potentially rewarding noncompliant employers.

The bid for ESR relief stems partly from problems plaguing IRS enforcement. The IRS began mailing "[226-J letters](#)" in 2017 to notify employers about proposed 2015 penalties and is now sending those letters for the 2016 calendar year. Most proposed penalties, however, appear to have been caused by system errors or mistakes made due to the complexity of the employer reporting requirements.

Apart from penalty relief or repeal of the ESR mandate, employers concerned about enforcement will probably push lawmakers to revive bipartisan proposals from the previous Congress that would streamline related reporting requirements ([HR 3798](#), [S 1908](#) and [HR 3919](#)). The bills proposed a voluntary reporting system that would relieve users from having to file Form 1094-C with the IRS. In addition, participants in the voluntary system would only have to distribute Form 1095-C individual statements to employees who have purchased coverage through an ACA public marketplace.

### ACTION STEPS

Unless and until Congress repeals parts of the ACA, employers should continue to comply with all applicable provisions, including the ESR requirements, IRS assessments and related reporting obligations. Employers should monitor congressional developments and consider engaging in advocacy activities through their representatives in Washington or trade groups.

## RELATED RESOURCES

### Non-Mercer Resources

- [HR 748](#), Act to Repeal the Excise Tax on High-Cost Employer-Sponsored Health Coverage (House, Jan. 24, 2019)
- [House of Representatives Files Motion to Intervene in \*Texas v. United States\*](#) (House Speaker's Office, Jan. 4, 2019)
- [Order Granting Stay and Partial Final Judgment in \*Texas v. United States\*](#) (N.D. Texas, Dec. 30, 2018)
- [Estimated Budget Effects of the Revenue Provisions Contained in the House Amendment to the Senate Amendment to HR 88](#) (JCT, Dec. 19, 2018)
- [Order Granting Partial Summary Judgment in \*Texas v. United States\*](#) (N.D. Texas, Dec. 14, 2018)
- [HR 3798](#), Save American Workers Act of 2018 (House Rules Committee, Sept. 7, 2018)
- [Estimated Budget Effects of a Temporary Moratorium on the Employer Mandate and a Delay in the Excise Tax on High-Cost Employer-Sponsored Health Coverage](#) (JCT, July 10, 2018)
- [Federal Subsidies for Health Insurance Coverage for People Under Age 65: 2018 to 2028](#) (CBO, May 23, 2018)
- [HR 3919 and S 1908](#), Common Sense Reporting Act of 2017 (Congress, Oct. 3, 2017)
- [Alliance to Fight the 40 | Don't Tax My Health Care](#) website

### Related Mercer Content

- [2019 Outlook for Healthcare Issues in Congress](#) (Jan. 24, 2019)
- [Employer Policy Priorities Dropping Off Congress' Lame-Duck Agenda](#) (Dec. 6, 2018)
- [The Flawed Logic of the Cadillac Tax, Explained](#) (Sept. 13, 2018)
- [The Impact of Repealing the Individual-Mandate Penalty](#) (Dec. 20, 2017)

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