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The Effects of the New Tax Law on Health Care: Elimination of the Individual Mandate Penalty and Increased Uninsured

Jennifer Straka

The Tax Cuts and Jobs Act (“TCJA”) was signed into law on December 22, 2017 by President Donald Trump.¹ This piece of legislation has been called the “most comprehensive change to the tax code since the Tax Reform Act of 1986.”² One of the law’s major health-related aspects is that it eliminates the penalty for those who fail to have health insurance as required by the individual mandate.³ The individual mandate was put into effect by the Affordable Care Act (“ACA”).⁴

While it sounds as if the individual mandate has been repealed, this is not the case.⁵ The individual mandate is still in effect.⁶ Instead, what the TCJA does is decrease the penalty to zero dollars.⁷ In reality, however, reducing the penalty of the individual mandate to zero is essentially the same as eliminating the individual mandate in its entirety.⁸ Many of the other provisions of the ACA remain in place that individuals and employers still need to comply with, such as the employer mandate.⁹ The employer mandate penalizes certain employers who do not provide affordable health care coverage to their employees.¹⁰

¹ *United States – President Trump signs Tax Cuts and Jobs Act into Law*, KPMG (Dec. 22, 2017), <https://home.kpmg.com/xx/cn/home/insights/2017/12/flash-alert-2017-192.html>.

² *Tax reform: What the 2017 Tax Cuts and Jobs Act means for you*, THE REGISTER-GUARD (Jan. 31, 2018), <http://registerguard.com/rg/news/36398423-76/tax-reform-what-the-2017-tax-cuts-and-jobs-act-means-for-you.html.csp>.

³ Diane Cross, *Tax Cuts & Jobs Act – Individual Mandate Repealed*, HORAN (Dec. 22, 2017), <https://www.horanassoc.com/health-compliance/blog/id/18174/tax-cut-jobs-act-individual-mandate-repealed>.

⁴ *Id.*

⁵ *The GOP Tax Bill Kills Obamacare’s Individual Mandate: Here’s What That Means*, TIME (Dec. 20, 2017), <http://time.com/money/5067044/gop-tax-plan-individual-mandate-obamacare/> [hereinafter *Tax Bill Kills Individual Mandate*].

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Cross, *supra* note 3.

¹⁰ *Employer Mandate*, U.S. CHAMBER OF COMMERCE, <https://www.uschamber.com/health-reform/employer-mandate#wrapper>.

HISTORY OF THE TAX CUTS AND JOBS ACT

The TCJA was introduced by Rep. Kevin Brady in the 115th United States Congress on November 2, 2017.¹¹ It was first passed by the House of Representatives on November 16, 2017.¹² It was then passed by the Senate on December 2, 2017.¹³ “On December 15, 2017, a House of Representatives and Senate Conference Committee released a unified version of the Tax Cuts and Jobs Act.”¹⁴

After the unified bill was passed, there was an objection that the version of the bill that was passed by the House violated the Byrd rule.¹⁵ The Byrd rule, which applies only in the Senate, prohibits “extraneous” provisions from being in a bill passed relating to the budget.¹⁶ The parts of the bill that were objected to were removed and the House passed a revised bill by a vote of 224–201.¹⁷ The TCJA was “then sent to the president for his signature.”¹⁸

ELIMINATION OF THE INDIVIDUAL MANDATE PENALTY

Starting in 2019, the penalty for not having health insurance is eliminated.¹⁹ That means the penalty is still in effect for this year, 2018.²⁰

The individual mandate was an important provision of the ACA.²¹ Both parties and the three opinions in *NFIB v. Sebelius*, the Supreme Court case in which the Court determined if the individual mandate was constitutional, recognized the significance of the mandate.²² The individual mandate expanded the risk pool for insurers by requiring all individuals to be covered, including

¹¹ H.R. 1, 115th Cong. (2017).

¹² *Preliminary Details and Analysis of the Tax Cuts and Jobs Act*, TAX FOUNDATION (Dec. 18, 2017), <https://taxfoundation.org/final-tax-cuts-and-jobs-act-details-analysis/>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Sally Schreiber, *President signs tax overhaul into law*, JOURNAL OF ACCOUNTANCY (Dec. 22, 2017), <https://www.journalofaccountancy.com/news/2017/dec/president-signs-tax-cuts-jobs-act-201718112.html>.

¹⁶ *What is the Byrd Rule?*, PETER G. PETERSON FOUNDATION, <https://www.pgpf.org/budget-basics/understanding-complex-budget-terms-and-processes-and-why-they-matter/what-is-the-byrd-rule>.

¹⁷ Schreiber, *supra* note 15.

¹⁸ *Id.*

¹⁹ *Tax Bill Kills Individual Mandate*, *supra* note 5.

²⁰ *Id.*

²¹ Timothy Jost, *The Tax Bill And The Individual Mandate: What Happened, And What Does It Mean?*, HEALTH AFFAIRS (Dec. 20, 2017), <https://www.healthaffairs.org/doi/10.1377/hblog.20171220.323429/full/>.

²² *Id.*

those that are young and healthy.²³ This provided insurance companies the ability to balance out the higher-cost individuals they insure with lower-cost, healthy individuals.²⁴ The individual mandate created an incentive for everyone to get insurance coverage, thereby easing the burden on insurance companies when it comes to paying out claims for individuals with costlier medical needs.²⁵

Under the ACA, unless an individual qualified for an exemption, they were required to get insurance coverage or pay a penalty.²⁶ The penalty for 2018 for a single person is \$695 or 2.5% of income, whichever is greater.²⁷ The penalty for a family is \$2,085 or 2.5% of income, whichever is greater.²⁸ The maximum penalty is \$13,100.²⁹ This number reflects “the national average price of a bronze plan sold through the Health Insurance Marketplace.”³⁰ A bronze plan is the lowest of the four metal level categories in the Health Insurance Marketplace.³¹ The different metal levels are Bronze, Silver, Gold, and Platinum going from lowest to highest.³²

A majority of Americans receive their insurance either through their workplace or through Medicare or Medicaid offered by the government.³³ If an individual does not receive insurance through their employer or the government, they must find coverage on their own to comply with the individual mandate.³⁴ Thomas Wilson, a Certified Public Accountant (“CPA”) and Partner at BDO, commented that he “know[s] of no one, either professionally as a CPA, or personally, who properly has been assessed this penalty. . . This issue is

²³ Nicole Goodkind, *Republican Tax Plan Will Make Health Insurance More Expensive*, NEWSWEEK (Dec. 18, 2017), <http://www.newsweek.com/obamacare-tax-plan-republicans-750871>.

²⁴ *Id.*

²⁵ Matthew Fiedler, *Repealing the individual mandate would do substantial harm*, BROOKINGS (Nov. 21, 2017), <https://www.brookings.edu/blog/usc-brookings-schaeffer-on-health-policy/2017/11/21/repealing-the-individual-mandate-would-do-substantial-harm/>.

²⁶ *Tax Bill Kills Individual Mandate*, *supra* note 5.

²⁷ *2017 and 2018 vs. 2019 Tax Penalty Amounts and Exemptions For Not Having Health Insurance Under ObamaCare – GOP/ Trump Updates*, SAVING 2 INVEST <http://www.savingtoinvest.com/penalties-for-not-having-health-insurance-under-obamacare/>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Health insurance plan & network types: HMOs, PPOs, and more*, HEALTHCARE.GOV, <https://www.healthcare.gov/choose-a-plan/plan-types/>.

³² *Id.*

³³ *Tax Bill Kills Individual Mandate*, *supra* note 5.

³⁴ *Id.*

not one that [his] clients face, as the vast majority of them have full ACA-compliant coverage through their employment.”³⁵

Experts predict that eliminating the individual mandate penalty will have “significant public health consequences.”³⁶ One of the purposes of implementing the individual mandate was to stabilize the insurance market for those who purchase their own insurance.³⁷ The ACA disallows insurance companies from charging people with more costly health care needs higher premiums for health insurance, or denying them insurance coverage entirely.³⁸ “But in order to insure people with pre-existing conditions at the same rates as healthy people of the same age, insurers need plenty of healthy consumers—those who pay premiums but don’t use much care—to subsidize the sick.”³⁹

One criticism of the individual mandate is that the IRS is highly limited on how it can collect the penalty.⁴⁰ The main way the IRS can collect the penalty is “to withhold it from an uninsured taxpayer’s tax refund.”⁴¹ An uninsured person can work around this by ensuring they have enough tax withheld during the year so that they have very little refund or no refund that the IRS can collect from.⁴² The IRS is working harder to enforce the penalty for the 2017 tax year.⁴³ In the past they accepted tax returns without the taxpayer’s healthcare coverage status for the year.⁴⁴ For 2017, taxpayers need to indicate their healthcare coverage or the IRS will not accept their tax returns.⁴⁵ Wilson noted that, “In practice, the efficacy of enforcement will depend on (1) the honesty of the individual taxpayer filing his tax return, as ours is a voluntary tax assessment system, and (2) the accuracy of government records.”⁴⁶ Wilson

³⁵ Interview with Thomas Wilson, Partner/CPA, BDO USA, LLP, in Houston, Tex., (Mar. 29, 2018).

³⁶ *Tax Bill Kills Individual Mandate*, *supra* note 5.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Stephen Fishman, *The IRS’s ability to collect the penalty for those who remain uninsured under the new health care law is very limited*, NOTO, <https://www.nolo.com/legal-encyclopedia/how-report-pay-the-new-health-insurance-penalty.html>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Robert Sheen, *Despite Tax Reform, Expect IRS to Enforce The ACA’s Individual And Employer Mandates*, THE ACA TIMES (Jan. 3, 2018), <https://acatimes.com/despite-tax-reform-expect-irs-to-enforce-the-acas-individual-and-employer-mandates/>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Interview with Thomas Wilson, *supra* note 35.

remarked that it is hard to say at this time if this change will improve the enforcement of the penalty.⁴⁷

MILLIONS MORE UNINSURED

The nonpartisan Congressional Budget Office (“CBO”) estimates that repeal of the individual mandate would cause four million more people to become uninsured in 2019.⁴⁸ By the year 2027, the CBO estimates that the number of uninsured will increase to 13 million more.⁴⁹ There are other estimates that predict the number of uninsured to be much lower, such as S&P Global’s prediction that by 2027 three to five million additional people will no longer have coverage.⁵⁰ While the estimates differ, “[i]nsurer and provider groups, patient and consumer groups, and actuaries concur that [the] repeal would have serious negative effects on the individual market.”⁵¹

Another prediction by the CBO is that premiums in the markets would increase by 10% if the individual mandate is repealed because the insurance companies are left with a costlier, sicker consumer base.⁵² This is because there is a concern that healthy people will withdraw from the Health Insurance Market when they are not mandated to have insurance.⁵³ Because of this, insurance companies would need to compensate for the lack of healthy people paying more for insurance than they use by raising their rates to cover the remaining, sicker customer base.⁵⁴ The individual mandate ensures that healthy people and not only sick people purchase insurance.⁵⁵ When the risk pool expands to include not only sick people, but those who are healthy as well, premiums remain lower for everyone.⁵⁶

Most individuals will not feel the effects of the increase in premiums because federal subsidies help individuals pay the cost of insurance premiums for

⁴⁷ *Id.*

⁴⁸ Jost, *supra* note 21.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Sy Mukherjee, *The GOP Tax Bill Repeals Obamacare’s Individual Mandate. Here’s What That Means for You*, FORTUNE (Dec. 20, 2017), <http://fortune.com/2017/12/20/tax-bill-individual-mandate-obamacare/> [hereinafter *Tax Bill Repeals Individual Mandate*].

⁵³ *Tax Bill Kills Individual Mandate*, *supra* note 5.

⁵⁴ *Id.*

⁵⁵ *Tax Bill Repeals Individual Mandate*, *supra* note 52.

⁵⁶ *Id.*

a majority of the people who have plans under the ACA.⁵⁷ “Those subsidies would rise in tandem with insurers’ rates.”⁵⁸ Those who do not receive subsidies because they make above 100% - 400% of the Federal Poverty Level (about \$48,000 for an individual or \$98,000 for a family of four) will feel the greatest burden of the increased premiums.⁵⁹ These groups of people “could find themselves priced out of the market.”⁶⁰ For people with high cost medical needs, this could be devastating to an individual or family’s financial situation.⁶¹

Another concern is that more insurance companies will opt to leave the Health Care Market completely instead of dealing with an unpredictable customer pool.⁶² This would leave consumers with fewer health insurance options.⁶³ There already have been issues with the availability of insurance providers on the marketplace in counties all over the United States.⁶⁴ In 2018, 52% of counties have only one insurer to choose from on the marketplace.⁶⁵ This amount has increased from 33% of counties in 2017.⁶⁶ The average number of insurance companies offering plans on the marketplace per state has decreased in 2018 to 3.5, down from 4.3 in 2017.⁶⁷

The TCJA has only recently gone into effect, and the individual mandate repeal still has yet to, therefore, it will take some time to fully understand the consequences of the Act on health care in the U.S. The predictions, however, suggest negative consequences for millions of Americans. Because the penalty for the individual mandate has been eliminated starting in 2019, many more Americans will be uninsured, either by choice or because they lack subsidies or affordable options. As healthy people drop out of the marketplace, the risk pool becomes sicker, causing health insurance premiums to rise. These increased premiums will drive even more healthy people out of the market, fur-

⁵⁷ Sy Mukherjee, *GOP Tax Plan Would Still Leave 13 Million Without Health Insurance*, *CBO Says*, FORTUNE (Nov. 29, 2017), <http://fortune.com/2017/11/29/gop-tax-plan-obamacare-cbo/> [hereinafter *13 Million Without Insurance*].

⁵⁸ *Id.*

⁵⁹ *Tax Bill Repeals Individual Mandate*, *supra* note 52.

⁶⁰ *Tax Bill Kills Individual Mandate*, *supra* note 5.

⁶¹ *13 Million Without Insurance*, *supra* note 57.

⁶² *Tax Bill Kills Individual Mandate*, *supra* note 5.

⁶³ *Id.*

⁶⁴ Ashley Semanskee et al., *Insurer Participation on ACA Marketplaces, 2014-2018*, KAISER FAMILY FOUNDATION (Nov. 10, 2017), <https://www.kff.org/health-reform/issue-brief/insurer-participation-on-aca-marketplaces/>.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

ther increasing the burden on people who have costly medical needs. The individual mandate penalty is not reduced to zero until 2019, so there is time for Congress to work on legislation that could improve the status of health care in America.

