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What To Do While Waiting For Cadillac Tax To Hit The Road

By **Stephanie Vasconcellos** (April 2, 2019, 2:58 PM EDT)


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The Affordable Care Act contains a provision — commonly referred to as the "Cadillac tax" — that provides for a nondeductible 40 percent excise tax on certain "high cost" employer-sponsored health coverage. The provision, which was originally slated to take effect in 2018, has been actively opposed by employers and insurers, who would ultimately be responsible for paying the tax.

Many claim the provision is not only overreaching, but that its broad scope will force employers to reduce or even eliminate benefits to avoid paying the hefty tax.

If implemented, the Cadillac tax is expected to serve as one of the Affordable Care Act's more significant revenue sources, particularly given the recent repeal of the individual mandate. Congressional Budget Office estimates from 2015 indicated that the Cadillac tax provision alone was expected to bring in $87 billion in revenue — well over 15 percent of the expected revenue under the Affordable Care Act — over the period from 2018 through 2025.[1]

Widespread opposition to the Affordable Care Act's Cadillac tax is due in large part to its low bar for determining what constitutes "high cost" health coverage. Generally, coverage is considered "high cost" if the cost exceeds the following — multiplied by a health cost adjustment percentage and/or a Consumer Price Index measure:

- $10,200 for self-only coverage and
- $27,500 for coverage other than self-only coverage.

A 40 percent excise tax is then owed on the "excess benefit" — that is, the amount by which the actual cost of coverage exceeds the threshold described above — each determined on a monthly basis.

The provision is sweeping, applying to more than just major medical coverage. For purposes of the Cadillac tax, one must also consider the cost of a variety of other arrangements, including retiree medical, health flexible spending arrangements, Archer medical savings accounts, wellness programs that are group health plans, health savings accounts and on-site medical clinics that provide more than de minimis medical care.

Additionally, the costs used to determine the amount above the “high cost” threshold are not limited to employer contributions. Even employee contributions towards coverage — such as employees' contributions to their own flexible spending accounts — must be considered when determining the cost of health coverage.

Moreover, the Cadillac tax provisions do not take into account other key factors affecting the price of major medical coverage. As a result, the Cadillac tax is expected to have a disproportionate impact on employers and insurers located in more expensive cities or covering employees in high cost industries.

The CBO estimates that revenue from the Cadillac tax will “grow very rapidly” each year, as more plans fall within its reach. This growth is primarily due to the index factor used to adjust the “high cost” figure, which is expected to grow at a slower rate than the actual cost of health care.

The Cadillac tax is to be paid for by the applicable insurer (for health insurance), the employer (for health savings account or Archer medical savings account contributions) and the “person that administers the plan benefits” for all other types of coverage.

While this language would, in many cases, result in a third-party administrator or insurer being responsible for the tax, the cost is typically passed on to the applicable plan sponsor or employer through administrative services agreements or similar arrangements.

Lobbying efforts, including work by the “Alliance to Fight the 40,” have succeeded in delaying the implementation of the Cadillac tax twice. Its implementation was first delayed until 2020 as a part of the Consolidated Appropriations Act, 2016.[2] Most recently, its implementation was delayed until 2022, pursuant to the Extension of Continuing Appropriations Act, 2018.[3]

Now, in a rare show of bipartisan support, bills are pending in both the U.S. House of Representatives and the U.S. Senate to repeal the provision. The co-sponsors of the bills argue that “[s]ensible health care policy should encourage employers to offer a full range of health plans to their associates, not punish them with an unfair tax for doing so,” and that the Cadillac tax will “dramatically increase the cost of healthcare.”[4]

This bipartisan momentum for a full repeal — rather than further delay — of the Cadillac tax provisions of the Affordable Care Act is building quickly. On March 6, Sen. Martin Heinrich, D-N.M., and Sen. Mike Rounds, R-S.D., introduced the Middle Class Health Benefits Tax Repeal Act of 2019 and have already secured 26 co-sponsors — 13 Republicans, 13 Democrats.[5]

Comparable legislation, introduced by Rep. Mike Kelly, R-Pa., and Rep. Joe Courtney, D-Conn., has been pending in the House since January 2019. That bill has similar bipartisan support — of the 246 co-sponsors, 112 are Republicans and 134 are Democrats.[6]

In the meantime, the foundation of the Affordable Care Act itself may be crumbling. On March 25, 2019, the U.S. Department of Justice filed a notice with the U.S. Court of Appeals for the Fifth Circuit, signaling that it no longer intends to defend the constitutionality of the Affordable Care Act.

While this and other actions by President Donald Trump’s administration suggest support for a repeal of the Cadillac tax, unless and until the provisions are repealed, continuing uncertainty leaves employers and insurers in a difficult position. Employers with health plans that are, or may be deemed, “high cost” must continue to consider the ongoing structure of their health benefit plans, including:

- Analyzing the potential impact of the excise tax given the employer's current benefits structure,

- Identifying areas where the employer could cut back on benefits without a material negative impact on employee population in order to lower costs, while minimizing the impact on employees and participants, and

- Considering any special circumstances that may have an impact on the employer's ability to change benefits — e.g., collective bargaining agreements — and negotiating flexibility and/or the ability to pass along the cost of the excise tax going forward.

If the Cadillac tax provision is indeed implemented, employers will need significant lead time to plan and implement any benefit changes.

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[1] Congressional Budget Office, Budgetary and Economic Effects of Repealing the Affordable Care Act, June 2015, available at: https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/50252-effectsofacarepeal.pdf.

[2] Consolidated Appropriations Act, 2016, P.L. 114-113.

[3] Extension of Continuing Appropriations Act, 2018, P.L. 115-120.

[4] See: https://kelly.house.gov/press-release/rep-kelly-introduces-bipartisan-bill-repeal-obamacare's-cadillac-tax and https://www.rounds.senate.gov/newsroom/press-releases/rounds-heinrich-lead-effort-to-repeal-cadillac-tax-on-middle-class-health-benefits.

[5] S.684, 116th Cong., Middle Class Health Benefits Tax Repeal Act of 2019, available at https://www.congress.gov/bill/116th-congress/senate-bill/684.

[6] H.R. 748, 116th Cong., Middle Class Health Benefits Tax Repeal Act of 2019, available at https://www.congress.gov/bill/116th-congress/house-bill/748.