March 2021 Washington Update

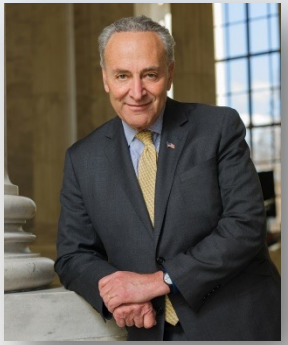
Presented by Chris Hartmann NAHU Vice President, Congressional Affairs

CONGRESSIONAL OUTLOOK

NAHU

Political Landscape: Senate

- With Joe Biden as the winner of the presidential race, Vice President Kamala Harris will act as the tie-breaker in a Senate made up of 50 Democrats and 50 Republicans.
- 60 votes are needed for cloture
- 51 votes are needed for passage/reconciliation



Chuck Schumer (D-NY)
Majority Leader

Mitch McConnell (R-KY)
Minority Leader

Party	117th Congress
Democratic	48
Republican	50
Independent	2 *
Vacancies	0
Total	100

*The two Independents caucus with Democrats

Political Landscape: House

- 218 votes are needed for passage

Nancy Pelosi (D-CA)
Speaker of the House

Steny Hoyer (D-MD)
Majority Leader

Kevin McCarthy (R-CA)
Minority Leader

Party	117th Congress
Democratic	220
Republican	211
Vacancies	4
Total	435

Implications of 50-50 Senate and Narrow Democratic House

Nominations

- It will be considerably easier for President Biden to have his nominees confirmed with Senate Majority Leader Schumer scheduling nominee votes.
- Since personnel decisions are largely party lines these days most will be confirmed. Expect some GOP support for many of the nominees however.
- Nomination will not be a guarantee, as some of President Trump's most controversial nominees were not confirmed even with a 53-seat majority.
- President Biden has announced the appointment/nomination of three Democratic House members to his administration and these vacancies will narrow Speaker Pelosi's already tight margins until special elections are held.

Implications of 50-50 Senate and Narrow Democratic House

Policy

- Legislation with bipartisan support but opposed by a majority of Senate Republicans will now get a vote, and some of those bills will become law.
- Using his power to bring up legislation, Majority Leader Schumer can now force votes on issues that have support on both sides of the aisle.
- It will still take the support of at least 10 Republicans to overcome a filibuster.

Implications of 50-50 Senate and Narrow Democratic House

Chairmanships & Hearings

- The leadership of the Senate committees and the ability to schedule hearings and markups will now flip to Democrats.
- How the committees are split, either fifty-fifty or with a Democratic majority, will determine the impact on legislative proposals.
- The clearest impact is the ability to convene hearings and call witnesses.

Implications of 50-50 Senate and Narrow Democratic House

Key Groups

- The support or opposition of **moderates** like Senators Joe Manchin (D-WV) and Susan Collins (R-ME); **in-cycle Senators** like Senators Mark Kelly (D-AZ), Rob Portman (R-OH), and Roy Blunt (R-MO); and **policy gangs** such as the one formed to push through the latest COVID-19 relief bill, will determine the outcome of most policy issues.

Implications of 50-50 Senate and Narrow Democratic House

Filibuster

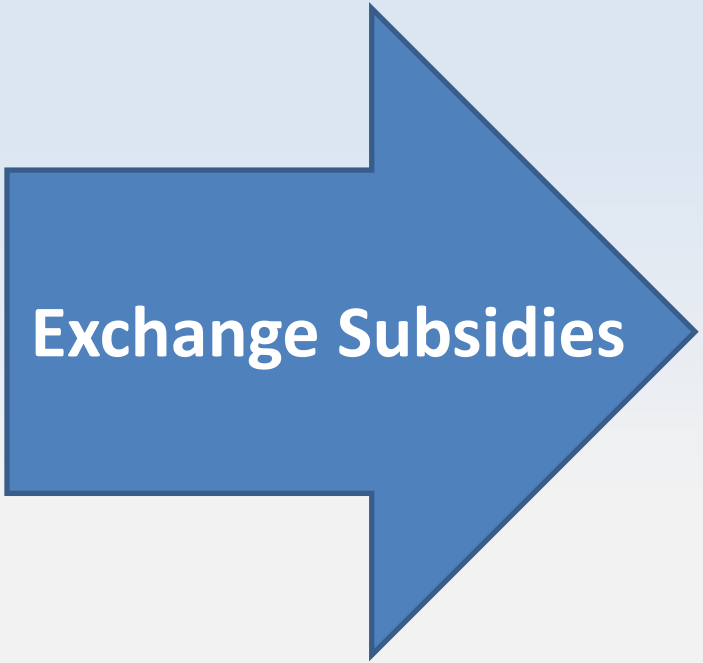
- There is no immediate threat of changing the filibuster rule, but pressure may build.
- It would take the support of all 50 Democratic Senators to eliminate or reduce the 60-vote threshold of the filibuster rule.
- Numerous Democratic Senators have said they oppose changing the rule, but that could change if virtually every bill, especially those with bipartisan support, is filibustered.

Implications of 50-50 Senate and Narrow Democratic House

Reconciliation

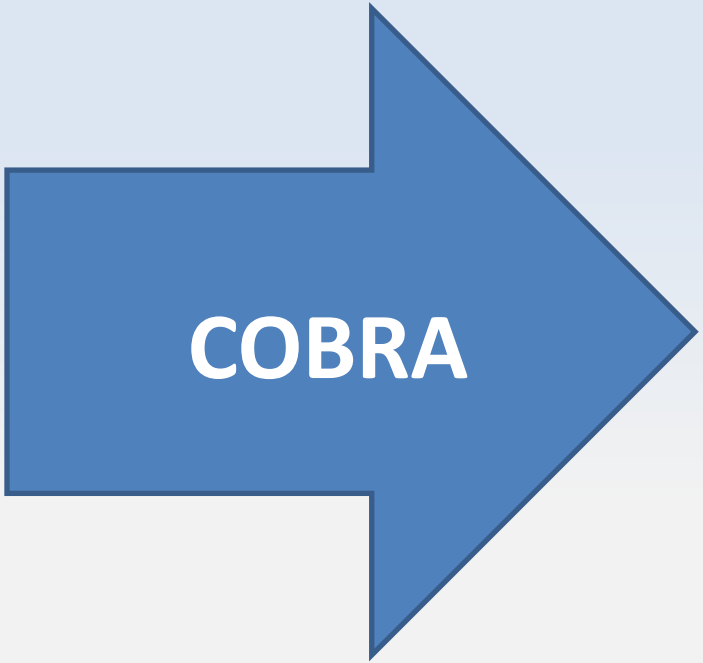
- Reconciliation, the process used to pass the Trump tax bill, Affordable Care Act, and the Bush tax bills with simple majority votes, is now back in play.
- Reconciliation can only be used for revenue and direct spending items and any proposal would require either bipartisan support or unanimous Democrat support.
- ***The House and Senate approved budget resolution measures to launch the reconciliation process and pass the $1.9 trillion American Rescue Plan without GOP support. President Biden recently signed the bill into law.***

Budget Reconciliation 1: *American Rescue Plan*



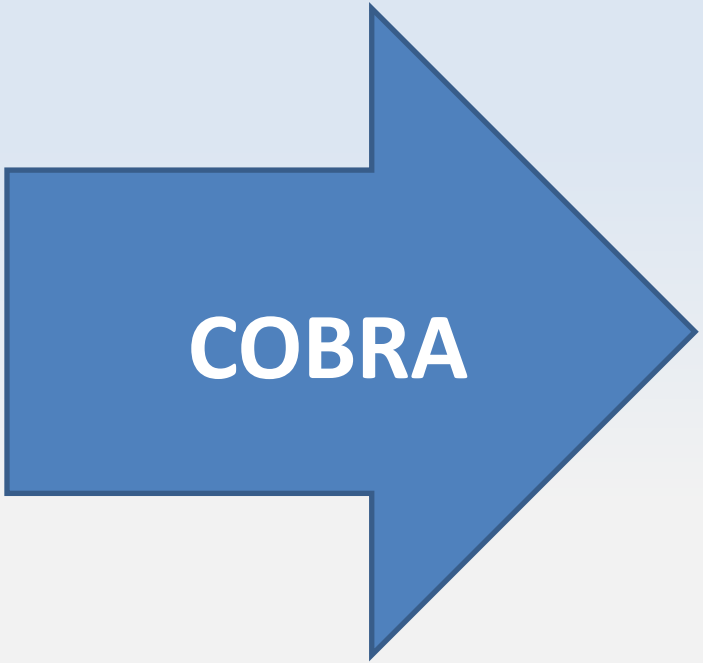
- An adjustment to the premium tax credit guidelines would temporarily – for this year and next year – eliminate the income cap for premium subsidies.
  - This means that – regardless of income – no one would have to pay more than 8.5 percent of their household income for the benchmark plan.
- Subsidies would phase out gradually as income increases.
  - Plan buyers would not be eligible for a subsidy if the benchmark plan's full price would not be more than 8.5 percent of the household's income.
- Subsidy enhancements will be retroactive to the start of 2021.
- Current enrollees will be able to start claiming any applicable extra subsidy immediately, or they can wait and claim in on their 2021 tax return.
- The additional premium subsidies would also be available for 2022, but would no longer be available as of 2023 unless additional legislation is enacted to extend them.

Budget Reconciliation 1: *American Rescue Plan*



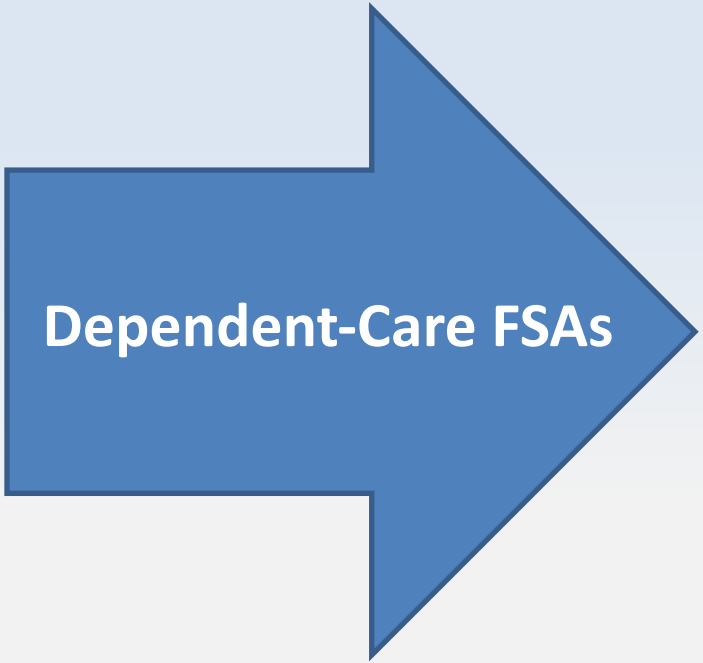
- The legislation offers federal subsidies for COBRA premiums at 100 percent coverage from April 1 to September 30, but are not retroactive.
- Any employee who lost health coverage for qualifying reasons between November 1, 2019, and September 31, 2021, could take advantage of COBRA subsidies.
- More specifically, these subsidies will be available to any previously covered employee or family member who may have lost coverage due to involuntary termination or reduction of hours and are still within their 18-month eligibility period.
- Subsidized coverage will terminate if the qualified individual exhausts the 18-month COBRA period prior to September 30 and could also end if the individual becomes eligible for coverage under another group health plan during the subsidy period or becomes eligible for Medicare.
- Those who are eligible under these parameters can sign up during a 60-day SEP beginning April 1.

Budget Reconciliation 1: *American Rescue Plan*



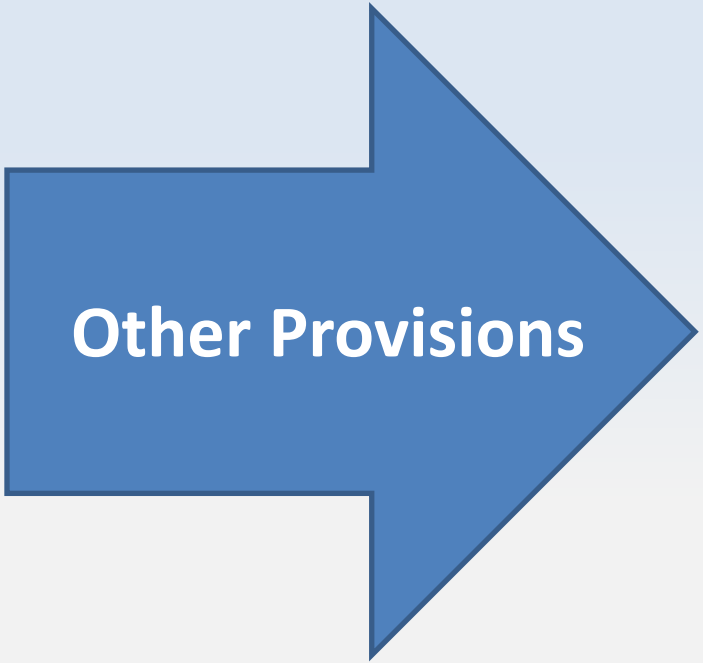
- Plan administrators will be required to amend existing COBRA notices and share a separate document with forms necessary for the employee to establish eligibility
- Organizations will be required to cover the monthly premium expense but will be able to reimburse these expenses through a quarterly credit against payroll taxes.
- If the overall amount an employer pays for subsidized coverage is greater than its quarterly tax liability, it may claim a refund.
- Several details of the rollout of this will be decided in regulatory guidance from the relevant federal agencies.
  - We anticipate this federal guidance to include precisely how to set up these provisions, likely prior to the implementation date of April 1.

Budget Reconciliation 1: *American Rescue Plan*



- Although the Consolidated Appropriations Act that passed at the end of 2020 allows a rollover of funds for 2020, the American Rescue Plan has increased the threshold for 2021 to $10,500 in a dependent-care account instead of the normal $5,000.
- Employers must adopt this provision in order for employees to increase their elected funds for their dependent-care FSA – it is not mandatory for employers to do this so FSA holders must check with the employer before increasing their contribution levels.

Budget Reconciliation 1: *American Rescue Plan*



- $300 a week in unemployment benefits through Sept. 6 and up to $10,200 in tax relief for unemployed workers.
- Up to $1,400 checks with tighter eligibility restrictions.
- $7.25 Billion added to PPP loans, extends eligibility to larger nonprofits.
- $15 Billion added to Economic Injury Disaster Loan (EIDL).
- Extends the Employee Retention Credit through 2021.

Healthcare Policy Outlook

Affordable Care Act	• Unlike some of his opponents who directly supported single-payer or Medicare for all, President Biden called for protecting and building on the Affordable Care Act which may be easier to achieve legislatively with a 50-50 Senate and Democratic House. • A public option will be unlikely, especially with moderate Senators like Jon Tester (D-MT), Kyrsten Sinema (D-AZ), and Joe Manchin (D- WV) inhabiting the Democratic Caucus. • Expect much of the Biden Administration's early months to be focused on undoing changes made by the Trump Administration, including limitations on short-term and association health plans, rescinding the public charge rule, a new approach towards the use of 1332 waiver flexibility, addressing the "family glitch" in the ACA exchanges, reimplementing transgender protections, and others. • Expect the Biden Administration to increase spending on enrollment marketing and outreach.

Healthcare Policy Outlook

Drug Pricing	• Similar to President Biden's proposals on the ACA, major sections of his drug pricing proposals would also require legislative action. • Concerns around the cost of prescription drugs run across the political spectrum and proposals to redesign the Medicare Part D benefit, reform how Medicare Part B drugs are paid for, cap drug price increases in public programs to the rate of inflation, and encourage value-based purchasing for prescription drugs could all secure bipartisan support as part of larger healthcare efforts. • If President Biden is unable to achieve his drug pricing agenda legislatively, he would likely have to rely on regulatory action; Key areas of focus could include a continuation of President Trump's international reference pricing efforts, other potential reforms of the Medicare Part B reimbursement system, and modifying Part D's protected classes.

Healthcare Policy Outlook

What Else Could Happen?

- Two more reconciliation options will be available before the end of the Congressional session in 2022 – one likely to be used in 2021 would probably be focused on infrastructure improvements, but might include a public option.
- However, a public option would be unlikely to survive a Byrd Rule challenge on reconciliation as any proposal would likely include a definition of what benefits would be available in a public plan, a violation of budget rules.
- Other must-pass legislation could become a vehicle for other issues such as the Medicare trust fund pending insolvency in 3 to 4 years, expiration of sequester relief, expiration of the debt limit extension, Supreme Court ACA decision, and the end of the fiscal year on September 30th 2021.

REGULATORY OUTLOOK

Biden Administration's First 100 Days: Healthcare

- Beyond ending the pandemic, the Biden Administration's initial health care priorities will focus on strengthening and expanding the Affordable Care Act.
- While unlikely to push legislation during the first 100 days, we anticipate a number of executive actions to be taken, including:
  - Reinstatement of ACA transgender and contraception protections
  - Restoring enrollment and marketing funding
  - Limitations on "short term junk plans"
  - Reproductive rights – including ending the global "gag rule"
  - Roll back 1332 State Flexibility and Medicaid waivers, e.g. block grant/work requirements

Biden Administration's First 100 Days: Coronavirus

Executive Actions

- Use of Defense Production Act to bolster PPE
- Establishment of Racial and Ethnic Disparities Task Force
- Establishment of National Pandemic Dashboard to track transmission
- Reestablish the White House National Security Council Directorate for Global Health Security
- Cancel process for US withdrawal from the World Health Organization
- Vaccine and treatment distribution plans
- Establish a nationwide mask mandate for all federal property and advocate for state and local mask mandates
- Federal guidance for state and local communities on best practices
- Review of domestic supply chains
- ***Federal special enrollment period (SEP) for COVID***

NAHU

Biden's January 28 Executive Order

- HHS will open HealthCare.gov for a "Special Enrollment Period," from February 15, 2021 – May 15, 2021. This Special Enrollment Period will give Americans that need health care coverage during this global pandemic the opportunity to sign up.
- *The Biden administration recently announced that they are extending the SEP to August 15, saying it will give people more time to shop for boosted health insurance subsidies Congress included in the American Rescue Plan.*
- Agencies are also directed to re-examine:
  - Policies that undermine protections for people with pre-existing conditions, including complications related to COVID-19;
  - Demonstrations and waivers under Medicaid and the ACA that may reduce coverage or undermine the programs, including work requirements;
  - Policies that undermine the Health Insurance Marketplace or other markets for health insurance;
  - Policies that make it more difficult to enroll in Medicaid and the ACA; and policies that reduce affordability of coverage or financial assistance, including for dependents.

Key Biden Cabinet Nominees & Appointees

Health	
Department of Health and Human Services	Xavier Becerra, Secretary of Health and Human Services
Centers for Medicare & Medicaid Services	Chiquita Brooks-LaSure, CMS Administrator
Centers for Disease Control and Prevention	Dr. Rochelle Walensky, Director of the CDC
National Institutes of Health	Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases (NIAID)
U.S. Public Health Service Commissioned Corps	Dr. Vivek Murthy, Surgeon General

Key Biden Cabinet Nominees & Appointees

Economy	
Council of Economic Advisors	Cecilia Rouse, Chair of CEA
	Jared Bernstein, Member of CEA
	Heather Boushey, Member of CEA
Department of the Treasury	Janet Yellen, Treasury Secretary
	Wally Adeyemo, Deputy Secretary of the Treasury
Department of the Labor	Marty Walsh, Labor Secretary
National Economic Council	Brian Deese, Director
Office of Management and Budget	Neera Tanden, Director of OMB

NAHU's Federal Priorities

Employer Issues

Preserve the Employer Tax Exclusion

- The employer-based system is highly efficient at providing American workers and their families with affordable coverage options through group purchasing and its associated economies of scale by spreading risk and avoiding adverse selection.
- The success of this system is possible because of the preferential tax treatment of employer-sponsored insurance coverage, where employer-paid contributions for an employee's health insurance are excluded from that employee's compensation for income and payroll tax purposes.
- Proposals that would cap the maximum value of the exclusion or eliminate it altogether would be detrimental to the stability of the employer-based market and would negatively affect middle-class Americans who currently benefit from this provision.

Employer Issues

Employer Reporting

- Establish a new voluntary reporting system, reduce the number of individuals and amount of information that would need to be reported, and eliminate the requirement to collect dependent social security numbers.
- Implement a suspension of enforcement during the months of the pandemic for employer-reporting provisions such as responding to 226-J letters, calculating affordability requirements for 1095 forms, and calculating ALE status with variable-hour employees.

Market Stabilizers

- Bring down the cost of healthcare by bringing down the cost of prescription drugs. Eliminate impediments to drugs getting to market, and consider methods used by other countries, such as an international pricing index.
- Fix the family glitch by clarifying that employee eligibility for affordable coverage does not extend to family members if there is not an affordable employer contribution to dependent coverage.

Single-Payer

- **NAHU is fully opposed to any form of single-payer**, be it through incremental approaches such as a public option or Medicare or Medicaid buy-in, or a more sweeping federal takeover of the entire healthcare system to implement a single standardized government-run plan.
- NAHU and the **Partnership for America's Health Care Future** are actively working to oppose single-payer, promote employer-sponsored health coverage and preserve Medicare, Medicaid, and other existing health programs on both the federal and state levels.

PARTNERSHIP FOR AMERICA'S
HEALTH CARE FUTURE

NAHU

Single-Payer

Medicare for All

- Medicare for All would not allow consumers to maintain their current coverage by eliminating employer-sponsored coverage and threatening the coverage of beneficiaries already on Medicare.
- The cost of Medicare for All is not sustainable and is estimated at $32 trillion over 10 years with an average tax increase of $24,000 per household, at a time when the financial viability of our current Medicare program is already in question.
- Medicare for All would reduce the standards of quality and access Americans currently enjoy in their healthcare by creating delays in medical treatment, tests and access to care.
- This would come as a result of doctors being unable to treat as many patients for the amount they would be paid, some doctors dropping out of the system, and hospitals put under pressure with a global budgeting process.

Single-Payer

Public Option

- The public option would destabilize current insurance markets by creating an unlevel playing field. This would happen when providers are compelled to accept payments at much lower rates than private carriers can require them to accept.
- The public option would compel hospitals and other providers to accept unsustainably low reimbursement rates, causing them to eliminate some services to patients, create waiting periods that would reduce services to patients, or leave unprofitable urban and rural areas.
- The public option could put more than 1,000 rural U.S. hospitals at high risk of closure by using Medicare provider reimbursement rates. These hospitals depend on a mixture of patient payment methods to allow them to provide services in these areas.

Medicare

COBRA

- Treat COBRA coverage as creditable coverage for Medicare, the same way that similar employer-sponsored insurance is already treated as creditable.
- This will allow beneficiaries to have access to Part B on a timely basis without penalties for late entry into the program.

Medicare

Observation Status

- Allow observation stays to be counted toward the three-day mandatory inpatient stay for Medicare coverage of a skilled nursing facility.
- Currently, Medicare beneficiaries who are not officially admitted to a hospital may be classified under “Observation Status,” which is treated as an outpatient procedure for billing purposes.
- This may lead patients, many who are extremely sick and spend many days in the hospital, to be charged for services that Medicare would have otherwise paid had they been admitted.

$1.4 Trillion Omnibus Package Includes Surprise-Billing Ban, Broker Compensation Disclosure & More

- This surprise-billing ban will hold patients harmless from surprise medical bills (including from air ambulance providers) in both emergency situations and certain non-emergency situations where patients do not have the ability to choose an in-network provider.
- For other claims, this new surprise-billing agreement utilizes arbitration.
  - NAHU has opposed arbitration as a solution to this problem, as we believe it could drive up costs for consumers in the long run.
  - Additionally, some private-equity firms have turned this kind of billing into a robust business model, buying physician staffing groups and moving the providers out of network so they could bill larger fees.
- However, this bill fortunately requires the arbiter to consider the median in-network rate for the service in question.

$1.4 Trillion Omnibus Package Includes Surprise-Billing Ban, Broker Compensation Disclosure & More

- The Omnibus Package also contains provisions on transparency, including disclosure of direct and indirect compensation for brokers and consultants to both employer-sponsored and individual-market plans.
- While NAHU supports transparency in healthcare, we have made it clear to both the Trump Administration and Congress that such legislation is redundant, as similar requirements exist at the state level as well as through Form 5500 under ERISA.
- In addition, these requirements could be a financial burden on carriers, employers, agents and brokers.
- We expressed these concerns in several comment letters as well as countless meetings with members of Congress to explain how transparent brokers already are regarding their compensation.

$1.4 Trillion Omnibus Package Includes Surprise-Billing Ban, Broker Compensation Disclosure & More

- In regards to Flexible Spending Accounts (FSA), this legislation provides further flexibility for taxpayers to roll over unused amounts in their health and dependent-care FSAs from 2020 to 2021 and from 2021 to 2022.
  - This provision also permits employers to allow employees to make a one-time 2021 mid-year prospective change in contribution amounts.
- Since March, NAHU has repeatedly requested that Congress take action to allow for such a rollover for FSAs and we are pleased that this was included in the COVID section of the omnibus bill.

Surprise-Billing Ban & Broker Compensation Disclosure Regulatory Road Ahead

- There are many aspects of the surprise-billing ban that will ultimately be left up to regulators, and NAHU will work with the federal agencies at every step of the way to ensure that this surprise-billing ban is executed in a way that works best for employers and consumers.

- The broker transparency provision will not go in to effect until the end of 2021 and will be phased in as plans renew and there will be extensive rulemaking on this provision as it does apply to individual, small- and large-group plans. NAHU will be working closely with the relevant federal agencies in this area as well, and through the regulatory process we will ensure this legislation is rolled out in a way that works best for agents, brokers and consumers.

NAHU

NAHU will continue to advocate on behalf of agents/brokers and your clients

NAHU Priorities

- Work with President and congressional leadership to determine the best approach and timing for change in our healthcare system.
- Continue to advocate for the need for valued guidance by health insurance agents, brokers, and consultants.
- Continue to advocate for a strong private health insurance market.

117th Congress

JUDICIAL OUTLOOK

California v. Texas

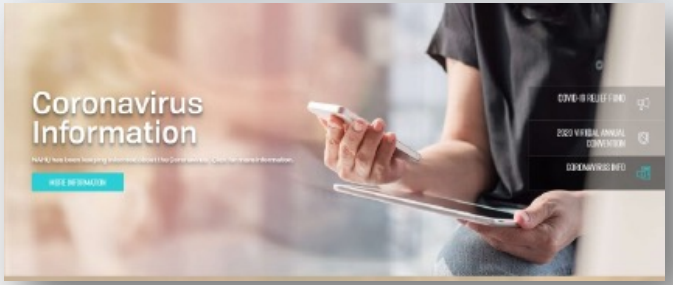
- The U.S. Supreme Court heard oral arguments for California v. Texas, the case challenging the Affordable Care Act's (ACA) constitutionality, on November 10th 2020.
- While the California v. Texas case questioning the constitutionality of the ACA loomed large in campaign rhetoric, the oral arguments on November 10th seemed to indicate the law will survive when the court rules sometime before July.
- Nevertheless, a surprise ruling that finds critical parts of the law unconstitutional could jumpstart some very complex negotiations between Biden, and bipartisan congressional leadership on how to preserve the law.
- ***Update: Department of Justice has dropped it's support of ACA challenge.***

California v. Texas

- The justices' lines of questioning during a two-hour-long argument session suggest at least two members of the court's newly fortified six-justice conservative majority have reservations about overturning or undercutting the ACA.
- Justice Kavanaugh appeared to signal on several occasions that he favored leaving the rest of the law intact if the mandate is struck.
  - "I tend to agree with you that it is a very straightforward case under our precedents, meaning that we would excise the mandate and leave the rest in place," Kavanaugh said.
- Chief Justice John Roberts, who authored the two previous opinions upholding aspects of ACA, said the court should consider whether Congress in 2017 intended for the rest of the law to survive if the mandate was found unconstitutional.
  - "Here Congress left the law intact when it lowered the penalties to zero," Roberts said. "That seems to be compelling evidence on the question."

Join Us!

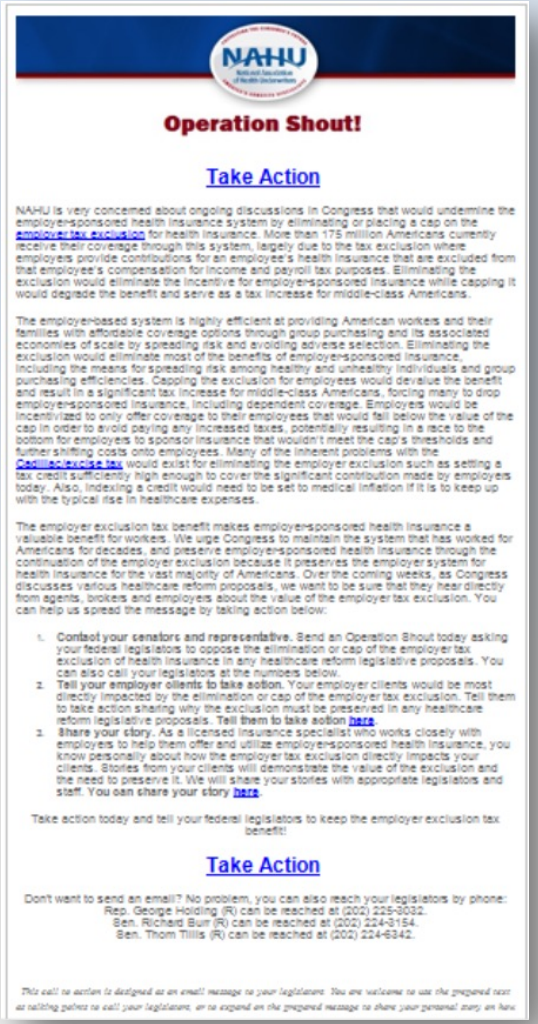
Cutting Edge Information!



Stay tuned for our new bi-weekly state policy newsletter!

Get Engaged!

NAHU activates **Operation Shout** to help members make their voices heard by policymakers.



NAHU

Operation Shout!

Take Action

NAHU is very concerned about ongoing discussions in Congress that would undermine the employer-sponsored health insurance system by eliminating or placing a cap on the employer tax exclusion for health insurance. More than 175 million Americans currently receive their coverage through this system, largely due to the tax exclusion where employers provide contributions for an employee's health insurance that are excluded from that employee's compensation for income and payroll tax purposes. Eliminating the exclusion would eliminate the incentive for employer-sponsored insurance while capping it would degrade the benefit and serve as a tax increase for middle-class Americans.

The employer-based system is highly efficient at providing American workers and their families with affordable coverage options through group purchasing and its associated economies of scale by spreading risk and avoiding adverse selection. Eliminating the exclusion would eliminate most of the benefits of employer-sponsored insurance, including the means for spreading risk among healthy and unhealthy individuals and group purchasing efficiencies. Capping the exclusion for employees would devalue the benefit and result in a significant tax increase for middle-class Americans, forcing many to drop employer-sponsored insurance, including dependent coverage. Employers would be incentivized to only offer coverage to their employees that would fall below the value of the cap in order to avoid paying any increased taxes, potentially resulting in a race to the bottom for employers to sponsor insurance that wouldn't meet the cap's thresholds and further shifting costs onto employees. Many of the inherent problems with the Cadillac/excise tax would exist for eliminating the employer exclusion such as setting a tax credit sufficiently high enough to cover the significant contribution made by employers today. Also, indexing a credit would need to be set to medical inflation if it is to keep up with the typical rise in healthcare expenses.

The employer exclusion tax benefit makes employer-sponsored health insurance a valuable benefit for workers. We urge Congress to maintain the system that has worked for Americans for decades, and preserve employer-sponsored health insurance through the continuation of the employer exclusion because it preserves the employer system for health insurance for the vast majority of Americans. Over the coming weeks, as Congress discusses various healthcare reform proposals, we want to be sure that they hear directly from agents, brokers and employers about the value of the employer tax exclusion. You can help us spread the message by taking action below:

1. **Contact your senators and representative.** Send an Operation Shout today asking your federal legislators to oppose the elimination or cap of the employer tax exclusion of health insurance in any healthcare reform legislative proposals. You can also call your legislators at the numbers below.
2. **Tell your employer clients to take action.** Your employer clients would be most directly impacted by the elimination or cap of the employer tax exclusion. Tell them to take action sharing why the exclusion must be preserved in any healthcare reform legislative proposals. **Tell them to take action here.**
3. **Share your story.** As a licensed insurance specialist who works closely with employers to help them offer and utilize employer-sponsored health insurance, you know personally about how the employer tax exclusion directly impacts your clients. Stories from your clients will demonstrate the value of the exclusion and the need to preserve it. We will share your stories with appropriate legislators and staff. **You can share your story here.**

Take action today and tell your federal legislators to keep the employer exclusion tax benefit!

Take Action

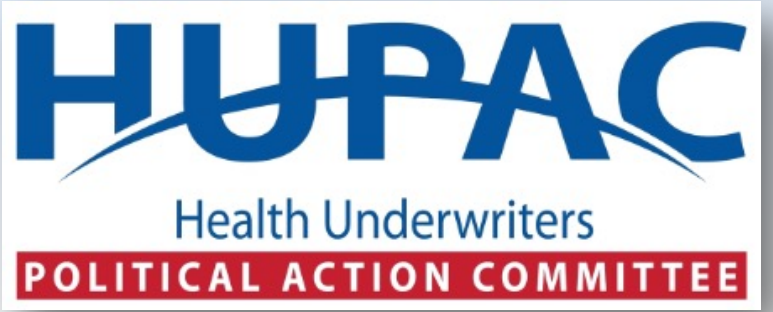
Don't want to send an email? No problem, you can also reach your legislators by phone:
Rep. George Holding (R) can be reached at (202) 225-3032.
Sen. Richard Burr (R) can be reached at (202) 224-3154.
Sen. Thom Tillis (R) can be reached at (202) 224-6342.

This call to action is designed as an email message to your legislators. You are welcome to use the prepared text as talking points to call your legislators, or to expand on the prepared message to share your personal story on how

Contribute!

Few other industries are as heavily regulated as health insurance. Your success, and that of your clients, is directly dependent upon the actions of Congress. It is absolutely critical that we help those Congressional candidates who support private sector health insurance.

Support legislators who fight for agents and brokers and the employer-based system



Resources

As insurance brokers trained in risk management, it is our job to analyze and identify risks that might adversely affect our client's business objectives. Compliance with federal statutes and regulations in the areas of insurance, labor and taxes is a daunting task for many of our employer clients.

With the NAHU Compliance Corner, you now have a one-stop place to find the majority of federal statutes that affect the employee benefits world.

Questions

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