Senate Better Care Reconciliation Act (BCRA) Abortion Coverage Provisions

The Senate released a discussion draft of the Better Care Reconciliation Act (BCRA) on June 22, 2017. The BCRA's provisions would also limit abortion coverage but differ somewhat from those included in the AHCA. The Senate's BCRA abortion provisions would:

- **Ban abortion coverage beyond the Hyde restrictions in all Marketplace plans, essentially restricting the right of states to regulate these plans.** Tax credits would not be available to purchase plans off the marketplace. The AHCA allows tax credits to be used to buy Marketplace plans and only private plans that do not include abortion coverage. Under current law, states decide whether plans sold on the ACA Marketplace and the private insurance market can include abortion coverage.
- **Disqualify small employers from receiving tax credits if their plans cover abortion, limiting employer discretion in selecting whether or not their plans include abortion coverage.** The AHCA would also disqualify small employers from receiving tax credits if their plans cover abortion. Current law has no such restriction.
- **Disqualify health insurance issuers that cover abortion services beyond Hyde restrictions from receiving funds from a newly established State Stability and Innovation Program.** Issuers in California or New York, where abortion coverage is mandatory, would not qualify for funds under this new program. The AHCA would block individuals from using tax credits to purchase plans on and off the Marketplace that cover abortion beyond the Hyde restrictions. Under current law, states decide whether plans sold on the ACA Marketplace and private insurance market can include abortion coverage.

Abortion Coverage in Private Insurance Plans Under the American Health Care Act

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The role of government in regulating abortion coverage began to be debated shortly after the landmark Supreme Court ruling in *Roe v Wade*. Since 1976, the Hyde Amendment has blocked federal funds under Medicaid and other federal programs from being used to pay for abortion, allowing exceptions only for pregnancies that endanger a woman's life, or that result from rape or incest. The Affordable Care Act (ACA) interpreted the federal abortion-funding ban to include the federal tax credits that functioned as premium subsidies to help individuals afford Marketplace plans. The American Health Care Act (AHCA), passed by the House of Representatives on May 4, 2017, would go further than Medicaid and the ACA in limiting coverage of abortion and would essentially remove state regulatory authority over abortion coverage in private plans by blocking any plan from including abortion services as a benefit. This issue brief reviews current federal and state policies on private insurance coverage of abortion services, and the potential conflict between the AHCA provision and state laws regulating private insurance.

State Laws on Abortion Coverage

Private Plans

States have the responsibility to regulate fully insured individual, small, and large group plans issued in their state, whereas self-insured plans are regulated by the federal government under the Employee Retirement Income Security Act (ERISA). States can choose to regulate whether abortion coverage is included or excluded in private plans that are not self-insured.

Two states, California and New York, require all private plans to include abortion coverage. California requires all plans, including individual and employer plans to treat abortion coverage and maternity coverage neutrally. As all plans are required to include maternity coverage, all plans must also include abortion coverage.[1] New York requires all insurance policies that provide hospital, surgical, or medical expense coverage to cover "medically necessary" abortions as well. Proposed regulations include a provision that coverage for medically necessary abortions must be provided without copayments, coinsurance, or annual deductibles, unless the policy is a high deductible health plan.

Ten states (Idaho, Kentucky, Missouri, North Dakota, Oklahoma, Indiana, Kansas, Michigan, Nebraska, and Utah) restrict abortion coverage in private plans. Some states follow the same restrictions as the federal Hyde Amendment for their private plans, while others are more restrictive. Nine of the ten states allow insurers to sell riders for abortion coverage on the private market; however, there is little evidence about their availability and no documentation of their cost or impact on access. Utah bans riders from being sold for abortion coverage.

ACA Marketplace Plans

The Affordable Care Act (ACA) specifically excludes abortion as an "essential health benefit." Furthermore, the ACA allows states to ban coverage of abortions in the plans that are available through the ACA Marketplace, and 25 states have done so. In 2016, an additional six states without an abortion coverage ban did not offer any plans that included abortion coverage through their Marketplace.[2] In the states that have no abortion coverage ban for Marketplace plans, individuals may use federal premium subsidies to purchase Marketplace plans that include coverage for abortion. However, the coverage must be paid for using private dollars, and the plans must segregate those funds from the general plan to ensure no federal dollars are applied to abortion coverage.

Abortion Coverage Restrictions Under AHCA

The AHCA, as passed by the House, would go further than the ACA in limiting abortion coverage in private plans (**Table 1**) by:

- Banning abortion coverage beyond the Hyde restrictions in all Marketplace plans, essentially restricting the right of states to regulate these plans.
- Prohibiting the use of federal tax credits to purchase any plans that cover abortion that are available *outside* the Marketplace.
- Disqualifying small employers from receiving tax credits if their plans cover abortion, limiting employer discretion in selecting whether or not their plans include abortion coverage.

- Under an AHCA separate amendment, self-executing upon enactment of the AHCA, individuals would be prohibited from applying premium tax credits to continue coverage through any COBRA policy that includes abortion coverage beyond the Hyde restrictions after leaving a job, regardless of employer size. This could have the impact of discouraging employers from including abortion coverage in their employees' health plans and result in women paying out of pocket for abortion services. Women who do not use insurance for a first trimester abortion pay an average of $568 in out of pocket costs.[3]

The AHCA would not block State Medicaid programs from using their own state funds to cover abortion beyond the limited Hyde circumstances.

Table 1: Summary of Proposed Changes to Abortion Coverage Restrictions in the Private Individual Insurance Market

	The Affordable Care Act (ACA)	The American Health Care Act (AHCA)
Who regulates abortion coverage in fully insured private plans sold in states?	States regulate fully insured private plans. • Ten states ban abortion coverage in private fully insured plans sold in their state. • Two states require abortion coverage in all fully insured private plans.	States would continue to regulate fully insured plans, but federal tax credits would only be used to purchase private plans that do not include abortion coverage beyond Hyde limitations. Insurer would not be prohibited from offering or an individual from buying separate policies to cover abortion, as long as no tax credits were to be applied.
Who regulates abortion coverage in state Marketplace exchanges?	States can choose to ban abortion coverage from plans offered through the Marketplace (25 states have done this). Federal regulations require that at least one Multi-State Plan that excludes abortion coverage must be available in each Marketplace.	Federal regulations would ban any qualified health plan offered through the Marketplace from covering abortion beyond Hyde limitations. Abortion coverage would no longer be available through any qualified health plans in the 25 states that currently allow plans to include it.
How are federal premium assistance and cost-sharing reductions limited for abortion coverage?	No federal premium and cost-sharing subsidies can be used to pay for abortion beyond Hyde limitations. In states that offer the option of abortion coverage, funds must be segregated, and there must be an option to enroll in a plan that does not include abortions.	No federal premium tax credits would be able to be used to obtain coverage from plans that cover abortion -- either on or off the Marketplace (cost-sharing reductions would eliminated by the legislation). Federal premium tax credits could only be used to offset the cost of COBRA plans that do not include abortion coverage beyond Hyde limitations. Small employers would not be allowed use tax credits to pay for plans that include abortion coverage beyond Hyde limitations.

State Laws in Conflict with AHCA

Because California and New York require plans that are not self-insured to cover abortion, if the abortion coverage ban under the AHCA becomes law, individuals living in those states would not be able to use federal tax credits to obtain coverage for any plan available in their state. In those states, only individuals seeking to purchase unsubsidized COBRA plans from employers with self-insured plans that do not have any abortion coverage (beyond the Hyde restrictions) would be able use premium tax credits toward the purchase of a plan. Essentially, no one in California and New York (man or woman) would be able to use tax credits to purchase an individual or fully insured group plan because of the conflict between the state law and the proposed legislation. In 2016, estimates show 1.2 million people in California used a total of $4.6 billion in tax credits to purchase insurance on the California Marketplace.

In New York, an estimated 124,000 people used a total of $264.5 million in tax credits to purchase Marketplace plans in 2016. This estimate, however, does not include additional federal funds New York received for individuals with incomes below 200% FPL enrolled in New York's Essential Plan, a Basic Health Plan. The AHCA would sharply reduce the federal funding available to support New York's Essential Plan because it would eliminate cost sharing subsidies and reduce of tax subsidies provided by the federal government to support the Plan.[4] Therefore, New York may not be able to continue the Essential Plan,[5] and individuals currently enrolled in the plan would have to try to enroll in Medicaid or a private insurance plan using tax credits. While there is no modeling available for how many people would use the available tax credits in New York or California under the AHCA, it is clear that coverage options for individuals in those states who want to use tax credits to purchase a plan would be nearly non-existent (other than self-funded COBRA plans that exclude abortion coverage).

California and New York Require Abortion Coverage in All Plans

California - In 2014, the California Department of Managed Care reasserted that the Knox-Keene Health Care Service Plan Act requires the provision of basic health care services. Several court decisions have confirmed that the California Constitution prohibits discrimination against women who choose to terminate their pregnancy. Therefore, all fully insured health plans in California must cover both maternity services and abortion services.

New York – New York law prohibits health insurance plans from excluding medically necessary care from coverage, including abortion. In January 2017, Governor Cuomo sent a circular letter to insurers reinforcing their obligation to cover abortion services. At the same time, the Governor proposed regulations that require insurers to provide coverage for medically necessary abortions without co-pays, coinsurance, or deductibles.[6] On June 5, 2017, Governor Cuomo directed the Department of Financial Services to promulgate regulations that would establish abortion as an Essential Health Benefit in New York, and require plans to cover abortion services with no cost sharing.

The Future of Women's Abortion Coverage

If the AHCA's restriction of the use of tax credits for any plan that covers abortion beyond the Hyde restrictions becomes law, there will be very limited abortion coverage in private plans in all states. For the first time, the federal government would limit abortion coverage in all private plans that receive any federal tax credits. This would fundamentally place a federal restriction on the ability of states to establish their own laws regarding the regulation of insurance plans. Given the direct conflict with state laws in California and New York that require all private plans sold in the state to include abortion coverage, there will likely be legal challenges if the AHCA is enacted with the current abortion coverage restrictions.

Endnotes

[1] Michelle Rouillard, Director of Department of Managed Health Care letter to Mark Morgan, California President of Anthem Blue Cross, RE: Limitations or Exclusions of Abortion Services. August 22, 2014. Available: https://www.dmhc.ca.gov/Portals/0/082214letters/abc082214.pdf.

[2] Kaiser Family Foundation. Coverage for Abortion Services in Medicaid, Marketplace Plans and Private Plans. January 2016.

[3] Roberts S.C.M., Gould H., Kimport K., Weitz T.A., Foster D.G. Out-of-pocket costs and insurance coverage for abortion in the United States. (2014) Women's Health Issues, 24 (2), pp. e211-e218.

[4] NYTorch, Empire Center. "How AHCA affects NY's Essential Plan." May 12, 2017. Available: https://www.empirecenter.org/publications/how-ahca-affects-the-essential-plan/

[5] Newell, P. United Hospital Fund. Rewind: New York State Faces Familiar Issues and New Challenges in the "Repeal and Replace" Era, page 7.

[6] New York State Department of Financial Services. Proposed Amendment to 11NYCRR 52 (Insurance Regulation 62).