



State exemptions to the Affordable Care Act expanded

In its latest blow to the ACA, the Trump administration provides guidance on how states can circumvent the health law. Susan Jaffe, *The Lancet's* Washington correspondent, reports.

The Trump administration is offering states an opportunity to change some fundamentals of the Affordable Care Act (ACA) by using a provision of the law intended to promote innovative ways to improve health insurance coverage.

In its most far-reaching move yet, the administration announced in October it was reinterpreting that provision, which allows federal officials to waive some requirements of the landmark health law for states that want to apply their own strategies for accomplishing its goals. Two weeks ago, it filled in the details.

To encourage states further, officials issued a 34-page guidance with examples of “waiver concepts” states could request that would be most likely to win approval. Some of the options states could pursue would change income-based eligibility for federal insurance subsidies and allow people to use subsidies to buy insurance policies outside the law’s health insurance marketplaces that do not cover its mandatory ten “essential health benefits” such as maternity care and prescription drugs, or protect patients with pre-existing health conditions. The waivers could take effect as soon as 2020.

President Donald Trump and congressional Republicans promised to repeal the ACA if elected in 2016. But Congress narrowly failed to do so last year and, following the Democratic takeover of the House of Representatives in last month’s midterm elections, the legislative route to repeal is effectively blocked. These administrative changes incorporate elements of the failed legislation and may be the closest substitute.

“This new guidance certainly does open the door to allow states to move back to more of a pre-ACA health-care environment”, said Jennifer Tolbert

director of state health reform at the Kaiser Family Foundation a co-author of a report released this week assessing the impact of the waiver changes.

The waiver provision “was created to generate new and better ideas that improve families’ health—the Trump administration’s approach warns over old and bad ideas that increase costs

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for consumers and lower the quality of care”, said provision author Senator Ron Wyden, an Oregon Democrat. Reworking the waiver process “accelerates America’s slide back to the days when health care was reserved for the healthy and wealthy,” he said.

Another waiver option the administration recommends would allow states to direct federal subsidies to people who also have employer-sponsored health insurance—a significant departure from the ACA, which provided financial assistance to those who generally had no other insurance and could not afford to buy it on their own. The employer’s portion of insurance costs could be combined with a federal subsidy and placed in a consumer’s health savings account and used to pay insurance premiums for plans that do not have to comply with ACA rules as well as to pay for other health-care costs.

Nearly 9.2 million with health coverage purchased in the ACA’s insurance marketplaces receive subsidies to lower their expenses. The lower your income and the older you are, the greater your subsidy, said Tolbert. Providing the limited amount of ACA federal subsidies and tax credits to a larger population

could reduce the amount available to the neediest individuals.

Democratic leaders in the House of Representatives believe administration officials lack the authority to change the ACA’s waiver provision. In a letter last month, they asked for details supporting the administration’s decision.

“Outside of the notice-and-comment rulemaking process, it interprets [the ACA’s waiver provision] to allow states to increase consumers’ costs, reduce coverage, and undermine protections for individuals with pre-existing conditions”, wrote New Jersey Representative Frank Pallone, senior Democrat on the Committee on Energy and Commerce and Massachusetts Representative Richard Neal, senior Democrat on the Committee on Ways and Means.

“It appears to be part of the administration’s ideologically motivated efforts to sabotage the ACA”, they continued. Both committees provide oversight of these agencies and both men are expected to head those panels when Congress convenes in January.

Timothy Jost, an expert on the health law and professor emeritus at Washington and Lee University School of Law, called the administration’s new interpretation of the waiver provision “quite bizarre”. It is a major change in



policy, not simply reinterpreting the law but changing how it operates. He predicted that any waivers states receive “will almost certainly be challenged in court”.

Flexibility

The new interpretation of the waiver rules provides states with the flexibility to create more choices and competition in their insurance market, said Seema Verma, the administrator of the Centers for Medicare and Medicaid Services (CMS), which oversees the law and operates its online insurance marketplaces. The new guidance for states “will empower them to mitigate the damage that Obamacare has done”, she told reporters during a conference call last month.

Before taking the helm at CMS, Verma was a private health-care consultant in Indiana who worked with state agencies to obtain ACA exemptions so they could pursue “innovative new strategies for improving their health care markets”, as she told state officials attending the American Legislative Exchange Council conference last month. Because the Obama administration’s interpretation of the waiver prerequisites was so restrictive, she said, the states she worked with abandoned their efforts.

“Based on that experience, I know there are opportunities for states, but I also know that Washington is too often an obstacle to innovation”, Verma continued. “Washington is where innovative policies go to die on the altar of bureaucratic worship.”

Most of the eight states that have received waivers so far have used them to divert a portion of federal subsidy money to reinsurance programmes that reimburse insurers for beneficiaries with high medical expenses.

She acknowledged that the ACA has expanded coverage to Americans who did not have insurance, but it has not lowered health-care costs, especially for those whose incomes exceed the limit to qualify for federal subsidies. One of the main reasons costs are too high is due to the lack of competition among

insurance companies and only a few dominate the market in some parts of the country.

Any changes will still have to meet certain criteria or “guard rails” in the ACA that guarantee Americans have access to insurance as comprehensive

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and affordable as that provided under the ACA for a comparable number of state residents, without increasing the costs for the federal government.

Verma also stressed that the administration is strongly committed to protection for people with pre-existing health conditions. Before Congress passed the law in 2010, companies could charge such patients more for insurance, decline to renew their policies, or simply deny them coverage.

“The president and [Health and Human Services] Secretary [Alex] Azar have both made clear we will protect people with pre-existing conditions.”

As long as there are policies available that meet the ACA criteria, other options can be more varied, said Doug Badger, a visiting fellow at the Heritage Foundation, who was a policy adviser for former President George W Bush. He also coauthored a Heritage report in September that recommended loosening Obama-era waiver restrictions.

“You can have products out there that are not ACA compliant”, he said, such as short-term policies that the Trump administration recently extended to a year instead of a few months. Such policies will likely cost less than ACA plans because their coverage is more limited. “But the point is they cannot be the only products available in the markets... policies with [ACA] protections will always be there.”

Consumers may be giving up certain ACA protections in exchange for more affordable policies, Badger said. “Those are the kind of decisions consumers make about every product they buy.”

Consequences

Whereas the new state waiver alternatives do not eliminate the ACA protections, they potentially undermine those protections in several crucial ways, particularly for people with low incomes or pre-existing health problems, said Tolbert. Less expensive and less comprehensive insurance policies will attract relatively healthy people. Sicker people with expected medical expenses will likely remain in the more generous ACA compliant plans that do not discriminate against those with pre-existing health conditions.

The ACA plans could become more expensive because premiums from healthy people are not helping to offset the cost of medical care. At the same time, stretching the subsidies to defray the costs for a larger number of people will make it more difficult for the patients who need insurance the most to afford it.

What happens next depends on what ACA exemptions states request and how closely their proposals resemble what the Trump administration has proposed. Several states are interested in pursuing waivers under the new guidance, according to a CMS spokesperson who said agency policies prevent public disclosure of preliminary discussions with states about waiver applications. But the official said states should contact CMS now if they want waivers that take effect in 2020.

A state would have to submit a proposal by spring 2019 in order for the federal government to review it, said Jost. That is an ambitious timetable and most likely the waivers would not be ready until 2021, after the 2020 presidential election. At that point, lawsuits could delay—if not block—any waivers that are approved.

And if President Trump is not re-elected, a Democratic administration would reverse course and, under some circumstances, could cancel the waivers.

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