Insight

Trump Administration Offers States More Flexibility on Health Insurance

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The Affordable Care Act (ACA) set substantial new federal requirements for health insurance plans and the insurers that provide them, but it also included in Section 1332 the option for states to apply for a waiver from many of these regulations. The statute and subsequent regulations set myriad stipulations for these 1332 State Innovation Waivers, however, and as a result only eight states have taken advantage of this option—with all but one implementing a state reinsurance program. Congressional efforts to ease access to these waivers floundered last year, but the Trump Administration has issued new guidance that gives states significantly more flexibility for obtaining waivers. This guidance prioritizes choice and access over coverage—a substantial shift from previous policy.

The Centers for Medicare and Medicaid Services (CMS) released new regulatory guidance for 1332 waivers on October 22nd, 2018, that replaces the guidance issued in 2015 under the Obama Administration—addressing many of the problems that Congress was trying to fix. In the guidance, CMS laid out five principles against which new waiver applications will be considered, in addition to the statutory requirements. These principles include the proposal's likelihood of: increasing access to affordable private market coverage, encouraging sustainable spending growth, fostering state innovation, supporting and empowering those in need (particularly individuals with low income and those with high expected medical costs), and promoting consumer-driven health care.

The new guidance loosens some of the current regulatory requirements to provide states greater flexibility in how they meet the law's mandates. The ACA requires that insurance offered under any state waiver be expected to achieve four outcomes, and the new guidance redefines how those outcomes will be assessed. These four outcomes include:

1. providing "coverage that is at least as comprehensive" as that required to be provided by a qualified health plan (QHP);
2. ensuring that coverage includes cost-sharing protections that make it "at least as affordable" as a QHP;
3. providing "coverage to as least a comparable number of its residents" as would be covered without the waiver; and
4. not increasing the federal deficit.

The most noteworthy difference in the new guidance pertains to the third requirement: providing coverage to a comparable number of people. For one, the administration will consider the number of individuals expected to be covered in each year under the waiver, but it may approve a state plan that could reduce the number of people covered in one year if it believes the number of people covered long-term will be at least as high as expected without the waiver. Second, the Trump Administration is reinterpreting the ACA's language to allow for this requirement to be met even if people are covered under less comprehensive (yet more affordable) plans.

The new guidance distinguishes between the first two requirements regarding comprehensiveness and affordability and this third requirement. It does so by noting that the third is a separate requirement and the language does not explicitly state that a comparable number of people must be covered by plans that are as comprehensive and affordable as would otherwise exist. Rather, the coverage requirement may be met so long as a comparable number of people have *some* form of coverage, and that coverage may include newly available types of coverage, such as a short-term limited duration plan or an association health plan.

In contrast, the first two provisions regarding comprehensiveness and affordability will be considered concurrently: Coverage options under the waiver must include plans that are both as comprehensive and affordable as without the waiver (as opposed to allowing a state to offer some plans that are comprehensive but not affordable and vice versa). That said, these requirements may be considered met if such plans are *available* to a comparable number of people as without the waiver, regardless of the number of people expected to enroll in them; the Trump Administration is referring to this as a new "access standard." This change underscores the administration's desire to ensure a range of options are available and thereby allow individuals to choose the coverage that is right for them. This change also supports the changes that allow people enrolled in less comprehensive or affordable plans to count toward the coverage requirement.

The new guidance also relaxes how much weight is given to a waiver's impact on certain subpopulations. The Obama Administration required that certain vulnerable populations, including low-income individuals, elderly individuals, those with serious health issues, and those at risk of developing serious health issues be protected against possible losses of coverage. It also required that the new options be as affordable and comprehensive for these specific populations, as well as that these populations be expected to enroll in such coverage. While the Trump Administration will still consider the impact on such subpopulations, they will allow the impact to the state's population as a whole to take precedent over "small detrimental effects" to particular groups. States will still need to have plans "to support and empower" individuals with low income and with high expected health care costs, however.

Regarding the plan's impact on the federal budget, the new guidance removes the Obama Administration's language stating that an increase in the federal deficit in any particular year may cause the waiver to be denied. Thus, as required by the statute, states will simply have to show that the plan will not increase the deficit over the course of the waiver (which may be up to five years) and will be budget neutral over the 10-year window, under the assumption that the waiver is in effect permanently. State governors have been seeking this change, as they have noted that costs are typically highest at the beginning of a new program as a result of one-time start-up costs; thus, there may be a cost increase in the first year that could be offset by decreases in later years.

Finally, the ACA requires that any state seeking a waiver pass its own law providing the state authority to enact and implement the waiver's plan. The new guidance stipulates that this requirement may be satisfied through the combination of a state law and regulation or executive order. This leniency accommodates states whose legislatures do not meet every year or only for part of the year and that thus may have difficulty passing legislation within the needed timeframe.

Aside from these regulatory changes governing the law's implementation, CMS has also stated in this guidance its intent to publish "Waiver Concepts" that will serve as waiver application templates. Several state officials have requested such templates, as they could ease the application process and reduce the burden on states.

Key committees in Congress considered legislative changes to address some of these issues as well as others, but those efforts stalled in committee. The administration has made clear, through its numerous health care regulations, its support for providing people more choices and fewer restrictions, and these changes are intended to provide such flexibility and choice, to the extent possible through regulatory changes. While some members

of Congress have sought other changes to the 1332 waiver requirements that that only they can enact, this new guidance likely resolves many of the concerns the committees attempted to address.