



American Society of Law, Medicine & Ethics

Next Steps in Health Reform 2017

Medicaid Waivers and Litigation
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Heather Howard

Lecturer in Public Affairs, Princeton University
Director, State Health and Value Strategies

Agenda

- 1332 Waivers: the Basics
- Current Status
- Looking Ahead

What Can be Waived?

Section 1332 authorizes waivers of four components of the ACA

1 **Individual Mandate**

States can modify or eliminate the tax penalties that the ACA imposes on individuals who fail to maintain health coverage.

2 **Employer Mandate**

States can modify or eliminate the penalties that the ACA imposes on large employers who fail to offer affordable coverage to their full-time employees.

3 **Subsidies**

States can modify or eliminate Marketplace subsidies (premium tax credits, cost-sharing reductions, small business tax credits) and receive the aggregate value of those subsidies for alternative approaches.

4 **Exchanges and QHPs**

States can modify or eliminate QHP requirements and can eliminate Exchanges as the vehicle for determining eligibility for subsidies and enrolling consumers in coverage.

What Can't be Waived?

States may not waive key consumer protections, especially for sicker people.

Fair play rules

States may not waive non-discrimination provisions prohibiting carriers from denying coverage or increasing premiums based on health status. States are precluded from waiving community rating rules, guaranteed issue, and preexisting condition.

What's in it for States?

- Flexibility to waive major ACA coverage provisions and try out solutions tailored to the state's specific needs.
- Opportunity to stabilize insurance market and reduce premiums.
- Access to federal funds that would otherwise be coming into the state through ACA programs.



What Guardrails Apply to Waivers?

Guidance released 12/16/15 established standards for applying the guardrails

1 *Scope of Coverage*

The waiver must provide coverage to at least as many people as the ACA would provide without the waiver.

2 *Federal Deficit*

The waiver must not increase the federal deficit.

3 *Affordability*

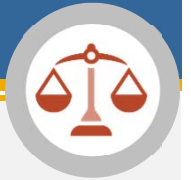
The waiver must provide “coverage and cost sharing protections against excessive out-of-pocket” spending that is at least as “affordable” as Exchange coverage.

4 *Comprehensive Coverage*

The waiver must provide coverage that is at least as “comprehensive” as coverage offered through the Exchange.

Standards Applicable to All Guardrails

HHS and Treasury will review whether the proposed waiver meets each of the guardrails with respect to:



- Impact on all state residents, regardless of type of coverage (Marketplace, employer, Medicaid, etc.), and cannot be combined with an 1115 waiver.
- Vulnerable populations, such as the poor, elderly, and chronically ill
 - Include analysis and supporting data on the number of individuals covered by income, health status, and age, with and without the waiver
- Each year of the waiver

Coverage Guardrail

The waiver must provide coverage to at least as many people as the ACA would provide without the waiver

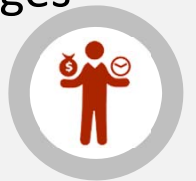
- The same number of state residents (or more) must be “forecast” to have coverage under the waiver as would have coverage absent the waiver
- Coverage refers to Minimum Essential Coverage
- Analysis considers whether waiver sufficiently prevents gaps in coverage



Affordability Guardrail

Waiver must provide coverage and cost-sharing protections so that coverage is as least as “affordable” as Exchange coverage

- Coverage under the waiver must be forecast to be as affordable overall for state residents as coverage absent the waiver
- Compare residents’ net out-of-pocket spending for premium and cost-sharing to their income, with and without the waiver
- Must not increase number of residents with large health care spending burden
- Same number of residents must have access to coverage that provides at least 60% actuarial value and complies with annual maximum out-of-pocket limits
- Consider changes in employer contributions to health coverage or wages



Comprehensiveness Guardrail

The waiver must provide coverage that is at least as “comprehensive” as coverage offered through the Exchange

- Coverage under the waiver must be forecast to be at least as comprehensive overall for residents of the state as coverage absent the waiver
- Coverage refers to scope of benefits provided, measured by:
 - Covering all ten EHB categories (e.g., maternity, mental health and substance abuse)
 - Meeting requirements within each EHB category (e.g., two drugs per class)
 - Medicaid and CHIP benefits, holding Medicaid policies constant



Deficit Guardrail

The waiver must not increase the federal deficit

- Projected federal spending net of revenues with waiver must be equal to or lower than spending net of federal revenues without waiver
 - **Revenue:** considers changes in income, payroll, excise tax, or user fees
 - **Spending:** considers changes in tax credits, CSR, and in Medicaid spending
- Savings generated by other waivers, such as Medicaid 1115 waivers, do not count; savings to other federal programs generated by a 1332 waiver do count
- Waiver must be budget neutral over a ten year budget period
- Waivers not budget neutral in a given year are less likely to be approved



Types of 1332 Waivers

- Narrow/targeted
 - Hawaii fix for pre-ERISA employer mandate
- Reinsurance program (AK, IA, MN, OK, OR)
 - Alaska stabilizes individual market through state-funded reinsurance program for high cost claims
 - 2017 rates expected to be +40% and ended up being +7%
 - 1332 waiver allows state to recoup (“pass-through”) some of the savings that would accrue to the federal government due to lower premiums
 - HHS specifically encourages state consideration of reinsurance programs
- Broader waivers
 - Iowa would fundamentally reshape subsidy structure, include elements of AHCA
 - Other possibilities: public option or Medicaid buy-in

1332 Waiver Activity: Latest Developments

Approvals

- Oregon reinsurance waiver approved
- Minnesota waiver approved but pass-through funding for BHP denied (\$258m/2 years loss)

Withdrawals

- Oklahoma withdraws waiver due to lack of timely approval
 - “. . . lack of a timely waiver approval will prevent thousands of Oklahomans from realizing the benefits of significantly lower premiums in 2018.”
- Iowa waiver withdrawn
 - “Section 1332 waivers in the Affordable Care Act are unworkable.”
 - Public reports that President Trump directed CMS to disapprove Iowa waiver

On Hold

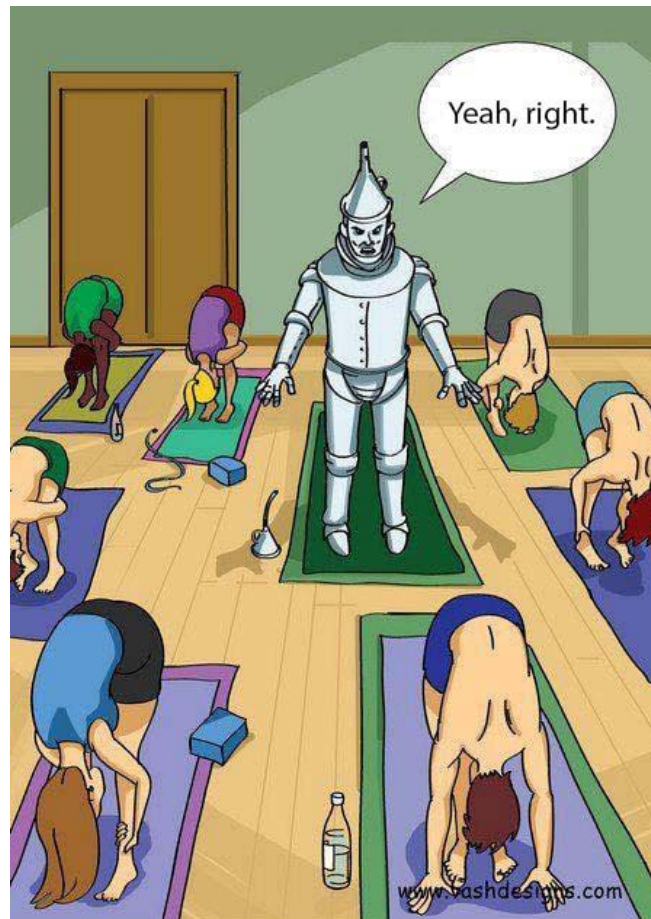
- Massachusetts waiver deemed incomplete
 - “Given that the waiver was submitted less than two months prior to the beginning of the 2018 open enrollment period and, if the application were deemed complete, the Federal public comment period would not end until after the beginning of open enrollment, the Departments have determined that there is not sufficient time to implement the proposed waiver.”
 - State can amend and attempt to move forward for plan year 2019

A map of the United States where states are colored based on five categories. The red states are Montana (MT) and Nevada (NV). The yellow states are California (CA), Iowa (IA), and Oklahoma (OK). The blue states are Oregon (OR), Minnesota (MN), and Alaska (AK). The green states are Texas (TX), Ohio (OH), Kentucky (KY), and Maine (ME). All other states, including Washington (WA), Idaho (ID), Wyoming (WY), Utah (UT), Arizona (AZ), New Mexico (NM), Colorado (CO), Kansas (KS), Nebraska (NE), South Dakota (SD), North Dakota (ND), Wisconsin (WI), Illinois (IL), Indiana (IN), Michigan (MI), Ohio (OH), Kentucky (KY), Tennessee (TN), Mississippi (MS), Alabama (AL), Georgia (GA), South Carolina (SC), North Carolina (NC), Virginia (VA), West Virginia (WV), Maryland (MD), Delaware (DE), Connecticut (CT), Rhode Island (RI), Massachusetts (MA), New York (NY), New Jersey (NJ), Pennsylvania (PA), and Florida (FL), are colored grey. Hawaii (HI) is also shown in grey.

Looking Ahead: the Future of 1332 Waivers

- What does this mean for the federal-state relationship and power balance?
- Will the Trump Administration issue new guidance relaxing rules?
- Prospects for Section 1332 waiver reforms in bipartisan fix legislation (or end of year omnibus legislation?)
- States planning for 2018 submissions (for plan year 2019)?
- Are 1332 waivers the new 1115 waivers?

State Waiver Flexibility



Thank You!

Heather Howard
Princeton University

heatherh@princeton.edu
Twitter: @HeatherHHoward
www.statenetwork.org