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## Healthcare Reform Update

In the first six months of 2018, healthcare reform has returned once again to the forefront of public and political discourse, as: the constitutionality of the *Individual Mandate* is currently being decided in federal court; more states are expanding Medicaid, using Section 1115 Waivers to establish work requirements; and, *Association Health Plans* are being more widely offered in an effort to cut costs. Recent developments relating to each of these three features will be discussed in this article.

Since its 2010 passage, the *Patient Protection and Affordable Care Act* (ACA) has been highly contested, and debate has only escalated since the *Tax Cuts and Jobs Act of 2017* was signed into law by President Donald Trump in December 2017.[1] This new legislation, to become effective in 2019, eliminates the ACA's *Individual Mandate* tax penalty, bringing the constitutional validity of the mandate into question, as its previous authority was established as a constitutional exercise of Congress's taxing power.[2]

In the 2012 case, *NFIB v. Sebelius*, the U.S. Supreme Court established that Congress can constitutionally impose the minimum essential coverage requirement of the *Individual Mandate* by making the penalty a "*tax*;" it was further held that the essential feature of any tax is that it "*produces at least some revenue for the Government*."[3] With the *Tax Cuts and Jobs Act* reducing this tax penalty to $0, it is "*[not] fairly possible*",[4] as Chief Justice Roberts explained in the 2012 majority opinion, to classify this mandate as a tax because it no longer meets this "*essential feature*" threshold, i.e., the ability to raise revenue.[5]

This is the argument that Texas, along with 19 other state plaintiffs, used in its lawsuit against the U.S. in the U.S. District Court for the Northern District of Texas, in an attempt to completely dismantle the ACA. The plaintiffs argue that this dismantlement is necessary because the requirements of the ACA are unlawful and nonseverable from the now unconstitutional *Individual Mandate*.[6] Specifically, the plaintiffs claim that the new tax law invalidates the *Individual Mandate* and thus, the entirety of the ACA.[7]

Subsequently, on June 7, 2018, the Office of the U.S. Attorney General released a letter asserting that, while the *Department of Justice* (DOJ) acknowledges and accepts that the *Individual Mandate* can no longer be held as constitutional, unlike Texas, it plans to argue that the *Individual Mandate* is severable from the ACA, meaning that the ACA can still function without the *Individual Mandate* in place.[8] The DOJ did, however, state that they do not believe that the "*guaranteed issue*" provision (requiring health insurance companies to accept all applicants regardless of pre-existing conditions); the "*community rating*" provision (banning health insurance companies from charging individuals higher premiums based on their health status); or, the requirement of providing the "*10 Essential Health Benefits*" within every plan, are severable, and do not plan to argue in support of their continuance.[9] As of June 22, 2018, a group of nine governors have responded to this letter with a request that Attorney General Jeff Sessions reconsider defending these provisions, and work toward bipartisan solutions to ensuring coverage and lowering healthcare costs, while still protecting those with preexisting conditions.[10]

If the argument of the 20 state plaintiffs is accepted by the federal court, and the entire ACA is eliminated, the number of uninsured Americans by 2019 would increase by 50%, or 17.1 million people, according to an *Urban Institute* analysis.[11] This analysis also found that in 2019, Medicaid and *Children's Health Insurance Program* (CHIP) would see an enrollment decrease of 15.1 million, individuals with private, non-group insurance would fall by 3.6 million, and those who remain insured "*would likely have fewer benefits and pay more out of pocket*."[12]

If the DOJ argument is accepted by the court, and these aforementioned provisions are not continued, health insurance companies will, once again, be able to implement underwriting techniques and deny people coverage or charge them higher premiums based solely on their medical history or current conditions.[13] This creates the potential of leaving yet more individuals uninsured, and consequently risks significantly increasing already high healthcare costs and health insurance premiums, which are the exact outcomes the ACA was enacted to avoid.[14] Pre-existing conditions may include cancer, diabetes, epilepsy, heart disease, arthritis, and even pregnancy (potentially reopening the door for gender-based health insurance discrimination).[15] Based on past use of pre-existing conditions and government surveys, the *Kaiser Family Foundation* estimated that, as of 2016, approximately 52 million Americans under the age of 65 had pre-existing conditions; without these preventative provisions in place, one out of every four Americans would have difficulty obtaining insurance


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coverage.[16] Further, a recent analysis completed by *Avalere Health*, found that the premiums for the popular silver-level health insurance plans are expected to increase by 15% in 2019,[17] perhaps as a response to this uncertainty in the healthcare industry.

In contrast to the push for the complete dismantlement of the ACA, final regulations for an ACA "*work around*" to current health insurance marketplace plans were released in June 2018 by the *U.S. Department of Labor* to expand eligibility for *Association Health Plans* (AHPs), in an effort to increase affordability of health insurance for Americans.[18] AHPs can be created and sold within a region or state by small businesses or trade groups.[19] The controversy behind these regulations is that while AHP insurance may be more affordable, the plans are expected to be exempt from ACA requirements, including the "*10 Essential Health Benefits*" and "*guaranteed issue*" provisions (described above), leaving individuals with less coverage.[20]

In contrast to the curtailing of many ACA provisions, the ACA *Medicaid Expansion* provision (through which states may increase Medicaid coverage to up to 138% of the federal poverty level) is experiencing a renaissance of sorts, with several states reevaluating their expansion options. Although originally a mandatory ACA provision, compliance to *Medicaid Expansion* was found by the U.S. Supreme Court in 2012 to be optional for the states.[21] As of June 2018, 17 states had yet to adopt *Medicaid Expansion*, with 3 of those states (Idaho, Utah, and Nebraska) currently considering expansion.[22]

In January 2018, *Centers for Medicare and Medicaid Services* (CMS) released a policy announcement supporting those states that seek to implement work or community engagement requirements (Section 1115 Waivers) for Medicaid enrollees.[23] This development has spurred multiple states to reconsider expanding Medicaid, with Virginia, Maine, and Idaho considering or passing legislation to bring *Medicaid Expansion* to their respective states.[24]

In May 2018, the State of Virginia, with its Republican-controlled Senate, voted to expand Medicaid to cover "*an additional 400,000 low-income adults*" starting in 2019,[25] but will be seeking a requirement that non-disabled adults must either work or volunteer to be eligible for the expanded program.[26] In the fall of 2017, Maine voters became the first state in the nation to approve *Medicaid Expansion* through a public referendum, but Maine's Governor, Paul LePage, refused to move ahead with the expansion.[27] In April 2018, advocates sued the LePage administration based on his refusal to comply, and in the judge's most recent ruling, she ordered the administration to submit a state expansion plan to the *Department of Health and Human Services* (HHS) by June 11, 2018.[28] On June 7, 2018, however, Maine Insurance Commissioner, Ricker Hamilton, filed an appeal arguing a separation of powers violation and requested the judge's order be stayed until the appeal is decided.[29] Maine's actual timeframe for submitting a state plan will likely become clearer following this litigation. Maine submitted a Section 1115 Waiver in 2017 to impose Medicaid eligibility work requirements for individuals up to age 64,[30] so it is probable that a variation of these requirements will be incorporated into their new state plan. In Idaho (a Republican majority state), expanding Medicaid coverage has become more favorable among residents, and petitions have been circulated to include the initiative on the upcoming November ballot.[31] If Idaho expands, an estimated additional 78,000 residents would be covered.[32]

Even states that have already expanded Medicaid are submitting Section 1115 Waivers to increase eligibility requirements; as of June 22, 2018, there are eight pending Section 1115 Waivers containing work requirements.[33] These pending waivers were submitted by Arizona, Kansas, Maine, Mississippi, Ohio, Utah, Wisconsin, and Michigan.[34] If approved, these eight states will join the four states that have already received approval for their work requirements: Arkansas, Indiana, Kentucky, and New Hampshire.[35]

The state of U.S. healthcare is constantly changing, and the ACA may be significantly revamped once again, pending: the outcome of the court's decision in *Texas v. U.S.* as to the status of the ACA; the ramifications of the expansion of AHPs; and, renewed state interest in expanding Medicaid, with the caveat of work requirements. Each of these developments is highly contested, and healthcare generally is expected to be one of the top voter issues in the 2018 midterm elections,[36] as Democrats seek to regain control in the U.S. House of Representatives and lessen the Republican majority in the U.S. Senate.

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