MERCER
MAKE TOMORROW, TODAY

LAW & POLICY GROUP

GRIST

NEW PUSH FOR ACA INNOVATION WAIVERS AIMS TO REKINDLE STATES' INTEREST

By Mercer's Kaye Pestaina and Catherine Stamm
May 21, 2019

In This Article

A new request for information (RFI) on "state relief and empowerment waivers" under Section 1332 of the Affordable Care Act (ACA) aims to encourage innovative reforms that strengthen state health insurance markets. Issued by the Health and Human Services (HHS) and Treasury departments, the RFI seeks to advance last year's guidance easing the criteria that states must meet to pursue innovation waivers. That guidance, along with a fact sheet and a 39-page discussion paper from the Centers for Medicare and Medicaid Services (CMS), suggested four approaches to state innovation waivers. Employers sponsoring group health plans should monitor state waiver activity since it could have plan consequences — for example, if a state seeks to change or waive ACA's premium tax credits or employer shared-responsibility requirements. The deadline to respond to the new RFI is July 2.

SHIFTING INTERPRETATION OF WAIVER CRITERIA

Under ACA Section 1332, states can obtain innovation waivers to pursue reforms without adhering to certain ACA requirements. If a waiver program reduces how much the federal government pays in premium tax credits and other ACA subsidies, the state can get those savings directly as federal pass-through funding.

ACA standards that HHS and Treasury can waive include:

- Employer shared-responsibility obligations
- Public health insurance exchange and qualified health plan certification requirements
- Premium tax credits for exchange coverage
- Certain individual and small-group insurance standards

MARSH & McLENNAN COMPANIES

However, states cannot get waivers of ACA rules, such as the ban on preexisting condition exclusions and the premium-rating standards for the private insurance market. States also cannot get waivers of any provisions in the Employee Retirement Income Security Act (ERISA).

To receive an innovation waiver, a state's proposed reform must meet four criteria, often referred to as ACA guardrails: The reform must generally provide coverage comparable to ACA-compliant coverage in (i) comprehensiveness, (ii) affordability and (iii) number of residents covered; and (iv) cannot increase the federal deficit.

GUARDRAIL FLEXIBILITIES IN 2018 GUIDANCE

The Trump administration's October 2018 guidance rescinds 2015 guidelines on what states seeking innovation waivers must do to meet these ACA guardrails. The new interpretation eases the standards for states to satisfy each guardrail.

Comprehensiveness

Under the 2015 guidelines, a state waiver program could not decrease the number of state residents with comprehensive coverage that satisfies all essential health benefit (EHB) standards and categories. Under the 2018 guidance, comprehensiveness is instead evaluated by comparing access to coverage that meets the state's EHB benchmark plan — not the number of individuals actually enrolled in that coverage. The 2018 guidance also notes that the HHS Notice of Benefit and Payment Parameters for 2019 grants states more flexibility to select a different EHB benchmark plan starting with the 2020 plan year.

Affordability

To measure a waiver program's impact on affordability, the 2018 guidance focuses again on state residents' access to — rather than enrollment in — affordable coverage. The Trump administration expects that states will have more options to make affordable coverage available through association health plans and short-term, limited-duration insurance policies. Under the 2015 guidance, a new waiver program couldn't reduce the number of state residents with coverage that has an actuarial value (AV) of at least 60%. This AV requirement is not in the 2018 guidance on affordability.

Covered Lives

Under the 2015 guidance, a state waiver program could not reduce the number of state residents covered by any type of health insurance. The 2018 guidance allows an initial reduction in the number of covered lives as a waiver program rolls out if the expected longer-term impact will reverse that decrease. Federal regulators also will take into account whether a waiver program will prevent coverage gaps or discontinuation — for example, by encouraging enrollment in short-term, limited-duration policies.

Deficit Neutrality

Besides prohibiting a program from adding to the federal deficit over the five-year waiver period or a longer 10-year window, the 2015 guidelines said a waiver would probably fail the deficit-neutrality standard if the program triggered even a single-year deficit increase. The 2018 guidance largely aligns with the earlier deficit-neutrality standard but is silent on whether a single-year deficit increase would affect this guardrail, signaling possible flexibility.

FOUR HHS SUGGESTED APPROACHES TO WAIVERS

In the 2018 fact sheet and discussion paper, CMS suggests four types of waivers that states may want to consider. Waivers are not limited to these four concepts, and states are free to pursue other approaches. However, the emphasis on these four areas shows which state reforms the Trump administration wants to support and encourage.

State-Specific Premium Assistance

Under this approach, a state waives federal premium tax credits to subsidize exchange coverage (Section 36B of the Internal Revenue Code) and instead creates a new state premium assistance program. The federal funds previously used for state residents' premium tax credits instead "pass through" directly to help the state fund its own program.

This type of program could allow more individuals with higher incomes to receive subsidies, the discussion paper suggests. For example, as an alternative to the current federal income and affordability rules for premium subsidies, a state program could restructure premium assistance as a set monthly amount per enrollee that varies only by age. The discussion paper also suggests other structures for state-based premium assistance.

Adjusted Plan Options

The ACA's federal premium tax credits are available only to eligible individuals enrolled in a qualified health plan through a public exchange. An innovation waiver proposing adjusted plan options would let a state offer premium assistance to residents enrolled in plans not allowed under the ACA, such as these examples:

- ***Catastrophic plans.*** By waiving certain ACA rules, a state could provide premium assistance for residents enrolled in so-called "catastrophic plans." Exchanges ordinarily can offer these plans only to individuals who are under age 30 or qualify for special exemptions, and no premium tax credits are available for these plans. Under the 2018 guidance, a state can waive ACA's enrollment restrictions on these plans, along with the limitation on subsidizing any coverage except qualified health plans.

- ***State subsidies for different types of coverage.*** Another option would let state premium assistance programs subsidize plans that are not offered on an exchange or do not meet the AV standards required in the individual and small-group market. For example, state assistance programs could subsidize employer-based plans, association health plans or short-term, limited-duration coverage.

Account-Based Subsidies

Under this approach, a state waives the ACA premium tax credit and uses the pass-through funding to set up consumer-directed defined contribution accounts to help residents pay health insurance premiums or other healthcare expenses. For example, a waiver program could create consumer-directed health expense accounts (HEAs) that would be subject to state regulation rather than the federal rules for health savings accounts (HSAs) and health reimbursement arrangements (HRAs).

Eligibility, contributions and use of accounts. A state-specific premium assistance program can have its own rules for subsidy eligibility (such as age-based criteria) and direct those subsidies into the newly created accounts. The state may determine how individuals may use the funds, such as to pay premiums, health expenses or wellness program costs, or to "support personal health (i.e. smoking cessation programs)." A state could allow individuals to aggregate funding through other sources, such as employer contributions to employees' accounts, according to the discussion paper.

Different sales platform. A state premium assistance program may use the existing public exchange platform, obtain a waiver to create a new platform or have no exchange platform at all. States with no exchange platform could rely on the private market and allow subsidies for all types of health insurance to fund the new accounts. These suggestions align with recent changes that encourage states to work with private-sector partners to replace the HealthCare.gov platform's consumer-facing functions, including enrollment.

Risk-Stabilization Strategies

This approach matches the design of most state innovation waivers approved to date.

Reinsurance. State reinsurance programs provide additional dollars to insurers covering individuals with high claim costs or specific conditions, thus lowering the overall premiums that individuals in the risk pool must pay. Since lower premiums reduce how much the federal government has to pay in premium tax credits, the savings become the federal pass-through funding that helps pay for the reinsurance program.

States like Alaska, Maryland and Minnesota have been using innovation waivers for various reinsurance programs. Treasury has released its method for determining a state's amount of pass-through funding under already-approved state innovation waivers for reinsurance programs.

High-risk pools. The discussion paper also recommends creating a separate high-risk pool where residents with high claims or specific conditions could obtain insurance coverage outside of the regular commercial marketplace. This separate risk pool would provide coverage only for these individuals. Thirty-four states had high-risk pools prior to the ACA's passage.

UNCERTAIN FUTURE

While the Trump administration's push for state innovation waivers has the potential to carve out ACA exceptions in each state, how many states will actually pursue these approaches is uncertain. Legislation pending in Congress or legal challenges in court could negate the revised waiver criteria. Even if the 2018 guidance remains intact, states may have doubts whether the effort of applying for and administering a waiver program will pay off. The guidance also leaves open questions about how the suggested approaches might affect ACA requirements for large employers' group health plans.

House Action

The House of Representatives this month passed legislation (HR 986) that would nullify the 2018 innovation waiver guidance. The bill's sponsors say that the revised criteria for approving a waiver could allow plans that discriminate against individuals with preexisting conditions. While Senate passage is unlikely, the legislation does highlight legal uncertainties about the guidance.

Legal Challenges

Unless upheld on appeal, the recent court decision invalidating the ACA (*Texas v. United States*, 4:18-cv-00167 (N.D. Texas Dec. 14, 2018)) won't prevent waivers and their associated pass-through federal funding from moving forward. But state waiver programs could face two types of more targeted legal challenges. One could involve the ACA's fundamental protections; the other could focus on the regulatory requirements for issuing significant guidance.

Preexisting condition, community-rating and nondiscrimination protections. The ACA does not allow a waiver of the ban on preexisting condition exclusions in any insured or employer self-insured health plan. The ACA's community-rating rules, which prohibit health-status rating and restrict age-based rating in the individual and small-group market, likewise cannot be waived. A waiver program also has to meet the ACA's nondiscrimination rules (Section 1557), which prohibit discrimination based on race, color, national origin, sex, age or disability.

While the 2018 discussion paper says the suggested waiver approaches would preserve preexisting condition protections, the option of expanding access to short-term, limited-duration coverage funded through state or federal subsidies raises legal questions. Those policies are not considered individual health insurance under federal law, so they can have preexisting condition exclusions and underwriting features that the ACA rules prohibit in the individual and small-group market.

As a result, waivers involving subsidies for short-term, limited-duration coverage may be challenged as undermining ACA protections. A federal district court in Washington, DC, recently struck down much of the new regulation on association health plans, finding — among other issues — that the rule "is clearly an end-run around the ACA" (*New York v. US Dep't of Labor*, No. 18-1747 (D.D.C. March 28, 2019)).

Administrative Procedure Act challenges. The 2018 guidance redefining the parameters for state innovation waivers was not issued as a proposed regulation. This means the guidance did not go through the formal notice and comment process typically required for agency regulations to have legal authority under the federal Administrative Procedure Act. As a result, a waiver approved under the revised guidance could be challenged as exceeding the agencies' authority.

Unclear Payoff for States

While more states may move to adopt their own reinsurance programs, other waiver approaches are more complicated. States that have seen their public exchanges start to stabilize may not want to make potentially disruptive structural changes. In some cases, creating state-specific subsidies and high-risk pools could carry much higher costs than the state would get back in federal pass-through funds, requiring additional state reforms to pay for the program. While the discussion paper suggests various new approaches, it does not address how states can show that a waiver program using one of those designs will meet the four ACA guardrails.

Implications for Large Employers Not Addressed

The October guidance does not address the impact that these waiver alternatives could have on large employers' ACA obligations, leaving some areas of uncertainty.

Employer shared responsibility. Most of suggested approaches in the recent RFI and 2018 discussion paper would involve a state waiving the ACA rules on federal premium tax credits. A full-time employee's receipt of those tax credits to buy exchange coverage is what triggers an employer's risk for shared-responsibility assessments. So if a state waives federal premium tax credits, does that eliminate the trigger for employer shared-responsibility assessments? Would that approach effectively waive employer shared-responsibility liability for employees in that state?

Employer-sponsored HRAs, HSAs. The discussion of account-based premium assistance does not address existing accounts like HSAs or employer-sponsored HRAs. How would a state's rules for consumer-directed accounts coordinate with federal HSA rules? If the Trump administration finalizes its 2018 proposal to let employees use HRAs to buy individual coverage, how could this interact with a new state-specific health expense account? What are the federal tax implications of this waiver approach?

Lack of uniform standards. Employers with multistate worksites could face differing state requirements that complicate determining shared-responsibility compliance or pursuing a defined contribution approach to help employees buy individual insurance. As states pursuing waivers seek additional funds to make the reforms work, employers could end up paying new health plan assessments that vary from state to state. If a state's assessment involves self-insured employers, litigation over ERISA preemption of the new state levy could lead to further uncertainty.

RELATED RESOURCES

Non-Mercer Resources

- Section 1332: State Innovation Waivers (CMS)
- HR 986, Protecting Americans with Preexisting Conditions Act of 2019 (Congress, May 15, 2019)
- Tracking Section 1332 State Innovation Waivers (Kaiser Family Foundation, May 10, 2019)
- Steps for States Considering a 1332 Waiver (CMS, May 9, 2019)
- Request for Information Regarding State Relief and Empowerment Waivers (Federal Register, May 3, 2019)
- Fact Sheet: Request for Information Regarding State Relief and Empowerment Waivers (CMS and Treasury, May 3, 2019)
- Entities Approved to Use Enhanced Direct Enrollment (CMS, April 5, 2019)
- *New York v. US Dep't of Labor*, No. 18-1747 (D.D.C. March 28, 2019)

- Method for Calculation of Section 1332 Waiver 2019 Premium Tax Credit Pass-Through Amounts (Treasury, Feb. 29, 2019)
- FAQs on Section 1332 State Relief and Empowerment Waiver Pass-through Funding (CMS, Feb. 28, 2019)
- State Innovation Waivers: Frequently Asked Questions (Congressional Research Service, Jan. 9, 2019)
- Fact Sheet: State Empowerment and Relief Waiver Concepts (CMS, Nov. 29, 2018)
- Discussion Paper: Section 1332 State Relief and Empowerment Waiver Concepts (CMS, Nov. 29, 2018)
- Proposed Rule on Health Reimbursement Arrangements and Other Account-Based Group Health Plans (Federal Register, Oct. 29, 2018)
- Guidance on State Relief and Empowerment Waivers (Federal Register, Oct. 24, 2018)

Mercer Law & Policy Resources

- Litigation, Legislation Leave AHP Guidance in Flux (May 2, 2019)
- Trump Administration Adjusts Course on ACA Case (March 27, 2019)
- Trump Budget Seeks Healthcare Reforms, PBGC Premium Hikes, Paid Parental Leave (March 20, 2019)
- 2019 Outlook for State Health and Leave Initiatives (Feb. 6, 2019)
- 2019 Outlook for Courts To Invalidate the ACA (Feb. 6, 2019)
- 2019 Outlook for ACA Legislation (Feb. 6, 2019)
- 2019 Outlook for President Trump's Health Policy Priorities (Feb. 6, 2019)

Other Mercer Resources

- 2018 Health Policy Agenda Starts With Win for Employers (Jan. 24, 2018)
- Lawmakers Eye Bipartisan ACA Fixes, Individual Market Stabilization (Sept. 7, 2017)

Note: Mercer is not engaged in the practice of law, accounting or medicine. Any commentary in this article does not constitute and is not a substitute for legal, tax or medical advice. Readers of this article should consult a legal, tax or medical expert for advice on those matters.