

Health Reform Update – Week of June 25, 2012

CONGRESS

U.S. Supreme Court upholds entire Affordable Care Act, but limits Medicaid expansion

In a landmark victory for those with rare and chronic disorders, the U.S. Supreme Court has upheld all of the provisions the Affordable Care Act (ACA), which will now be fully implemented as planned in 2014.

The case was brought by the Florida Attorney General and eventually joined by 26 other states and the National Federation of Independent Business. The 11th Circuit Court of Appeals agreed with the plaintiffs that the mandate that everyone buy health insurance they can afford or pay a fine went beyond Congress' traditionally broad power to regulate interstate commerce (see Update for Week of August 8th).

Chief Justice Roberts had hinted during oral arguments last March that the so-called individual mandate was not a mandate at all, but rather a tax incentive (see Update for Week of March 26th). As a result, despite agreeing with the 11th Circuit that the individuals cannot be forced into commerce, he instead sided with the Court's four liberal justices and upheld the individual mandate under Congress' taxation power, which is even broader than its power to regulate interstate commerce. However, the decision holds that individuals consequently cannot be assessed criminal penalties for not buying health insurance, only the tax.

The high court flatly rejected the decision by the Fourth Circuit Court of Appeals that the federal Anti-Injunction Act bars such a tax from being litigated until it was actually enforced after 2014 (see Update for Week of September 5th). As a result, it will go into effect as scheduled, while those consumer protections that became effective in 2010 remain intact.

The narrow decision also upheld the expansion of all Medicaid programs to 133 percent of the federal poverty level in 2014, but only if states could "opt out" of the expansion without being stripped of all federal Medicaid funding. As a result, states that "opt out" will now lose only the enhanced federal funds for the ACA expansion and can continue to receive their existing federal matching rate—a decision that many Democrats fear may seriously undermine the ACA's ability to gain near universal coverage.

It is not immediately clear how many states will actually opt-out of the expansion (see articles below), as the Congressional Budget Office previously found that the federal government will bear nearly 93 percent of the cost of the expansion for the first nine years, and 90 percent thereafter. However, several conservative governors insist that it will actually cost their states hundreds of millions of dollars.

The majority of states had delayed implementation of many key provisions of the ACA until the Supreme Court resolved the law's constitutionality. As a result, it is unclear if they can meet key federal deadlines, such as making "substantial progress" on the new health insurance exchanges by January 1st (see articles below). Those that are unable to do so will have a federal fallback exchange operated in their state starting in 2014.

The Court's four dissenting justices all sought to strike down the entire law, after Roberts sided with them in agreeing that the individual mandate was not a valid regulation of interstate commerce. However, because the Chief Justice instead upheld the mandate as a tax, the Court did not need to consider if interrelated parts of the law must fall because of the unconstitutionality of this key provision.

Roberts' opinion was far from an endorsement of the new law, as it effectively places new curbs on federal power consistent with his conservative principles. However, Roberts emphasized that judicial restraint dictates that judges refrain from striking down laws with which they disagree, stating that "it is not our job to save the people from the consequences of their political decisions."

At least 120 House Republicans immediately cosponsored legislation to eliminate the individual mandate (H.R. 6048) and pledged to hold an additional vote to repeal the entire law on July 11th. Senate Republicans also insisted that because the Supreme Court declared the mandate to be a tax, it could be repealed through the budget reconciliation process with only a bare majority, instead of the 60 votes needed to break a filibuster. This would make it possible for them to repeal certain provisions if they gain control of both the Senate and the White House next year.

Allowing states to opt-out of Medicaid expansion may increase costs of Affordable Care Act

Despite earlier pledges to implement the Affordable Care Act (ACA) if it were upheld, governors in at least seven states (Georgia, Idaho, Louisiana, Nebraska, South Carolina, South Dakota, and Wisconsin) indicated this week that they would exercise the new flexibility given to them by the U.S. Supreme Court this week and "opt out" of the law's mandate to expand their Medicaid programs (see articles below). Conservative governors in several other states like Florida, Indiana, Nevada, Ohio, Oklahoma, Pennsylvania, Virginia, Tennessee, Texas, and Wyoming are weighing whether to do likewise.

Under the constitution's "spending clause", Congress can place conditions upon how states use federal funds, and withdraw those funds to compel state behavior. Congress used this authority to mandate under the ACA that all states expand Medicaid eligibility to 133 percent of the federal poverty level or forgo all federal Medicaid funding. Lower courts all upheld this expansion on the basis that Medicaid is a purely voluntary program and objecting states could always "opt out".

However, two liberal justices surprisingly sided with Chief Justice John Roberts this week to place new limits on this spending power, arguing that the threat of losing federal Medicaid funds that often comprise more than ten percent of state budgets was unduly coercive and did not give states a real choice. Roberts held that this expansion effectively "transformed" Medicaid beyond "a program to care for the neediest among us" into a "gun to the head" that forms "an element of a comprehensive national plan to provide universal health insurance coverage."

As a result, the justices declared the expansion unconstitutional unless states were allowed simply to decline the ACA funding for the expansion and not forgo all federal Medicaid assistance. (The federal matching rate ranges from 50-75 percent depending on per capita income in each state and averages 57 percent nationwide).

Although the decision gives states the new-found freedom to "opt out" of the expansion and continue receiving their traditional federal matching rate for Medicaid, the Obama Administration scoffed this week at the notion that states would decline what Justice Kagan previously termed a "huge gift". (Under the ACA, the federal government assumes 100 percent of the cost of the expansion through 2016, 95 percent in 2017, and 90 percent in 2020 and beyond.) They noted that many of the same Republican governors threatened not to accept federal stimulus funds under the American Recovery and Reinvestment Act, but ultimately did so.

However, conservative governors have repeatedly insisted that the expansion will cost state hundreds of millions (if not billions) of dollars, despite findings to the contrary from the Urban Institute and Center for Budget and Policy Priorities (CBPP). The latter emphasized this week that the additional cost to states from 2014-2022 represents a mere 2.8 percent increase from what they will spend if they "opt out" of the expansion, not including the massive cost-savings from having less uncompensated care.

Despite these findings, the political gain from opting-out has already led several conservative governors to at least threaten to do so until this fall's election determines whether Republicans gain sufficient control to repeal the ACA. The Supreme Court decision did not appear to limit a state from

opting-out at least for one year, then opting back in at a later date and still receiving full federal assistance for the Medicaid expansion (although that decision may be left to the Obama Administration).

Both CBPP and the American Enterprise Institute warned this week the decision by states to opt-out of the expansion could greatly increase the overall costs of the ACA. CBO had projected that an additional 17 million adults would gain Medicaid coverage by 2022 as a result of the expansion, as the median state now only covers working parents who earn less than 63 percent of FPL and non-working parents with incomes below 37 percent. (Only a handful of states provide coverage to any low-income adults without dependent children.)

If Medicaid coverage is not expanded as projected due to states opting-out, CBPP pointed out that costs for the entire law are likely to jump as individuals instead receive federal subsidies to purchase coverage or impose greater costs of uncompensated care. As a result, lawmakers from both parties immediately weighed whether to propose legislation that would create additional incentives for states to participate in the Medicaid expansion. However, Senator Lindsey Graham (R-SC) demanded a floor vote on his measure from last year (S. 1587) that would clarify a state's right not to participate, as "the legal decision [may not be] as clear as our bill."

The CBO director stated that his office needed some time to evaluate how the court decision will impact their projections. CBO has estimated that the ACA would reduce the federal deficit by \$210 billion over a decade, primarily by raising revenue by \$813 billion.

The National Association of Medicaid Directors emphasized that the new flexibility granted by the court was limited to the ACA expansion and "does not apply retroactively to previously federally mandated expansions, or necessarily to potential future expansions".

President to sign bill creating new user fees, accelerating access to lifesaving drugs

The Senate overwhelmingly passed legislation this week that reauthorizes the user fee programs that fund Food and Drug Administration (FDA) reviews of drug and medical devices. The move paves the way for the President to sign the measure next week, after it passed the House last week by voice vote.

S. 3187, which will also create new user fees for generic drugs and biosimilars, was opposed only by conservative Senators Rand Paul (R-KY), Richard Burr (R-NC), and Tom Coburn (R-OK), as well as independent Bernie Sanders (I-VT). The rare bipartisanship in both chambers enabled it to pass well in advance of the September 30th expiration of the existing user fee program, a dramatic departure from the contentious reauthorization five years ago.

The new user fees will pay for roughly 60 percent of FDA review costs for the next five years. The measure also includes provisions to address ongoing shortages in lifesaving drugs, reduce the time FDA has to make administrative decisions, expand agency consultation with rare disease experts and otherwise accelerate patient access to lifesaving drugs, and extend the market exclusivity period for antibiotics used to treat certain serious conditions (see Update for Week of June 18th).

FEDERAL AGENCIES

HHS rolls out new exchange establishment grants in wake of U.S. Supreme Court ruling

The Department of Health and Human Services (HHS) followed the U.S. Supreme Court decision this week with an announcement that it will provide ten additional opportunities for states to apply for federal exchange establishment grants and/or partner with the federal government on exchange.

HHS has already issued more than \$850 million in level one and two exchange establishment grants for 34 states and the District of Columbia. The agency previously extended the June 30th deadline for additional grant applications until November 2014 (see Update for Week of February 27th), and under

the new announcement will let states apply through the end of 2014, including applications for “cooperative agreements” for a federal-state exchange partnership. States can continue to use the exchange grants beyond 2014.

The Obama Administration has repeatedly emphasized that their objective is to enable as many states as possible to create their own exchange, instead of defaulting to a federal fallback (see Update for Week of February 20th). As a result, they have often verbally signaled that the agency may extend their January 2013 deadline for states to have made substantial progress towards exchange implementation, especially as many states with Republican governors have elected to “wait and see” if the U.S. Supreme Court overturns the ACA (see Update for Week of February 27th). However, HHS has yet to take any formal action to extend that deadline.

New Treasury rules restrict abusive debt collections in non-profit hospitals, pursuant to ACA

The Department of Treasury released new proposed rules last week that will protect patients from abusive debt collection practices at nonprofit hospitals.

The regulations are intended to prevent practices that came to light during a recent Senate hearing and investigation by the Minnesota Attorney General. The hearing highlighted notorious practices by one company, Accretive Health, which allowed debt collectors to pursue collections from patients being treated in hospital emergency rooms.

The new rules will prohibit such abusive collections in charitable, non-profit hospitals, which constitute three out of every hospitals nationwide. They require non-profit hospitals to establish and publicize financial assistance policies, give patients a “clear explanation” of how they can get free or reduced-cost care, and allow patients at least eight months to apply for it. The rules also do not allow hospitals to charge uninsured patients more than they charge insurers.

Patient advocates like Community Catalyst praised the regulations. However, the American Hospital Association (AHA) insisted that they are overly burdensome and place too much of the blame for past abuses on hospitals. AHA specifically complained about onerous penalties that could cause entire non-profit hospital systems to lose their tax exemption for a single hospital's mistake.

The new rules were promulgated pursuant to a provision in the Affordable Care Act that was long-championed by Senator Charles Grassley (R), who has target the debt collection practices of hospitals.

STATES

California

Governor appears poised to sign renewed bleeding disorders legislation

The Assembly unanimously concurred this week with Senate amendments to A.B. 389, which will establish requirements for entities that provide blood clotting products for home use in the treatment of bleeding disorders (see Update for Week of June 18th). The measure is expected to be signed by Governor Jerry Brown (D). A previously-passed measure in 2010 was vetoed by then Governor Arnold Schwarzenegger (R) (see Update for Week of February 28, 2011).

Healthy Families children officially moved to Medi-Cal managed care

Governor Jerry Brown (D) signed a budget package this week that approved the elimination of the Healthy Families SCHIP that he had sought (see Update for Week of June 18th). A.B. 1494, which easily cleared the Assembly earlier in the week, will move nearly 900,000 children into managed care plans under Medi-Cal.

Expanded rate-review initiative suffers another setback

A voter referendum that would give the Insurance Commissioner his long-sought authority to modify or reject unreasonable premium increases has failed to qualify for the November ballot.

Insurance Commissioner Dave Jones (D) and officials with the advocacy group Consumer Watchdog previously submitted 800,000 voter signatures to the Secretary of State. However, the Secretary denied the petition this week after concluding that only 67 percent of the signatures were valid. State law requires at least 69 percent of the signatures to be valid in order for a voter referendum to be placed on the ballot. As a result, the initiative likely will not appear on the ballot until at least 2014.

The defeat is the latest blow in Commissioner Jones' campaign to expand the rate review authority of his office. Bills that he sponsored as Assemblyman and endorsed last session have failed to pass for the past several years (see Update for Week of August 29th).

Georgia

Governor to delay insurance exchange, Medicaid expansion

Governor Nathan Deal (R) announced this week that he will delay implementation of the health insurance exchange required by the Affordable Care Act (ACA) and is likely to opt-out of the law's required Medicaid expansion, at least until the November election clarifies whether Republicans will be able to repeal the provisions.

Governor Deal had created an exchange advisory panel and supported exchange implementation until local tea party opposition to implementing any part of "Obamacare" scuttled authorizing legislation he supported (see Update for Week of January 9th). Despite pledges to move forward should the law be upheld by the U.S. Supreme Court, the Governor promptly decided this week against implementing the exchange, all but ensuring a federal fallback exchange will operate in Georgia starting in 2014.

The Governor also indicated he would take advantage of the flexibility granted by the U.S. Supreme Court to opt-out of the Medicaid expansion and continue operating the state's traditional Medicaid program with its existing federal matching funds (see above).

Kentucky

Governor to promptly issue executive order creating state-based health insurance exchange

Governor Steve Beshear (D) announced this week that will "soon" issue his promised executive order creating the health insurance exchange required by the Affordable Care Act (ACA).

Kentucky received a \$58 million federal exchange establishment grant last February. However, the Governor's efforts to implement the exchange have been thwarted by the legislature's refusal to pass authorizing legislation.

As a result, Governor Beshear pledged to follow the lead of Democratic or independent governors in Minnesota, New York, and Rhode Island and circumvent legislative inaction via an executive order. However, he previously had agreed not to do so until the U.S. Supreme Court first resolved the constitutionality of the ACA (see Update for Week of April 30th).

Now that the law has been upheld (see above), Beshear insisted that the state need to promptly move forward to meet the January 2013 deadline to avert a federally-facilitated exchange (FFE) and retain state control. He projects that the exchange will serve over 300,000 uninsured individuals and small business employees in Kentucky.

Michigan

Governor weighs federal partnership in order to implement state-based insurance exchange

In the wake of the U.S. Supreme Court decision to uphold the Affordable Care Act (ACA), Governor Rick Snyder (R) announced that he will seek to partner with the federal government in order to comply with the law's deadline to create a health insurance exchange by January 2013.

Snyder has consistently been one of the few Republican governors to commit to creating a state-based health insurance exchange, as required by the new law. However, House Republicans have steadfastly refused to let state agencies use the \$9.8 million federal exchange establishment grant obtained by the Governor, despite passage of exchange-authorizing legislation by Senate Republicans (see Update for Week of December 12th). Appropriations chair Chuck Moss (R) acknowledged that many of his peers would "rather be caught sacrificing to Satan than voting for [any part of] Obamacare."

However, House Speaker Jase Bolger (R) agreed this week to work with the Governor in seek federal permission for a joint partnership that would enable the state to comply with the federal deadline and still retain some control over key exchange functions. Bolger acknowledges that the state simply does not have the time to make the "substantial progress" required by January 2013 and would otherwise have to allow a federal fallback exchange to be operated in Michigan.

The Department of Licensing and Regulatory Affairs was directed last year by the Governor to begin preparations on the exchange for an estimated 500,000 uninsured individuals and small business employees, but little progress has been made due to legislative opposition. As a result, Governor Snyder emphasized the need to be a "pragmatist" and pursue the flexibility granted under federal regulations to pursue a federal-state partnership (see Update for Weeks of November 21st and 28th).

Arkansas, Montana, and Wyoming are among the other states seeking federal permission for an exchange partnership, at least for the initial years of operation.

Nebraska

Governor reconsiders plans to create state-based health insurance exchange

Despite assurances from the Department of Insurance that the state can meet federal deadlines to create a health insurance exchange, Governor Dave Heinemann (R) indicated this week that he may wait until the Presidential election this fall to decide whether to implement any provisions of the Affordable Care Act (ACA).

Although the Governor had followed the lead of most of his Republican colleagues and refused to move forward until the U.S. Supreme Court resolved the constitutionality of the new law, he had pledged to protect Nebraskans from a federal fallback exchange should the ACA be upheld (see Update for Week of November 21st and 28th). Insurance officials even began the process of soliciting potential exchange vendors earlier this year (see Update for Week of February 27th). However, despite the urging of several Republican lawmakers to now create the exchange, the Governor is openly weighing whether to once again postpone implementation until Republicans have a chance to gain sufficient federal control to repeal part of all of the ACA (see above).

Senator Rich Pahls (R), chairman of the Banking, Commerce and Insurance Committee, had been working "behind the scenes" with Insurance officials to ensure the state could make "substantial progress" on a state exchange and avert a federal fallback. Pahls sponsored an exchange-authorizing bill that stalled last session, which would have housed the exchange within the Insurance department (see Update for Week of January 9th). He had urged the Governor to create the exchange via executive order if the ACA was upheld.

Governor Heinemann had previously obtained a \$6.4 million federal grant to design the exchange. His Insurance commissioner also informed a Senate panel last February that the Governor was prepared to create the exchange via executive order, if need be.

However, the Governor has since been among the most vocal opponents of implementing any provision of "Obamacare" and immediately pledged in the wake of the Supreme Court ruling this week not to participate in the required Medicaid expansion (see above). Governor Heinemann has repeatedly insisted that the expansion would cost Nebraska up to \$766 million over the next decade, although the Kaiser Commission on Medicaid and the Uninsured projects it will cost from \$106-155 million.

Even though Governor Heinemann refused this week to call a special session to pass exchange-authorizing legislation, Senator Pahls scheduled a special July 19th hearing for lawmakers to consider various options.

New Jersey

Governor intends to honor pledge to implement health insurance exchange

Governor Chris Christie (R) pledged this week to meet the federal deadline for creating a state-based health insurance required by the Affordable Care Act (ACA), after the U.S. Supreme Court issued a "screwy opinion" upholding the constitutionality of the new law (see above).

The Governor had vetoed exchange-authorizing legislation last month, but pledged to move forward should the ACA be upheld (see Update for Week of May 7th). He indicated this week that he would honor that pledge, though it was unclear if New Jersey could still meet the federal January 2013 deadline to avert a federally-facilitated exchange (FFE). It also is unclear whether the Governor will issue an executive order or require the legislature to pass new authorizing legislation.

The Governor has already obtained over \$8.7 million in federal grants to design the new exchange, which is supported by nearly 60 percent of New Jerseyans under age 65 (see Update for Week of April 2nd). However, Christie's ultimate decision may be complicated by rumors that he is under consideration by the presumed Republican nominee for President, Mitt Romney, to be on selected as a vice-presidential nominee. Romney renewed his pledge this week to repeal the entire law if elected.

Pennsylvania

Insurance Department to move forward with exchange implementation

Department of Insurance officials announced this week that will start using the \$33 million federal exchange establishment grant to create the health insurance exchange required by the Affordable Care Act (ACA).

As attorney general, Governor Tom Corbett (R) had joined Pennsylvania to the multi-state lawsuit challenging the constitutionality of the ACA that failed this week in the U.S. Supreme Court (see above). However, he was one of the few Republican Governors who had directed state agencies to begin preparing for the new law, including developing plans to create a state-based health insurance exchange.

Although they already used the initial \$1 million planning grant, the Department of Insurance had been barred by the Governor from touching the \$33 million grant he obtained earlier this year until the U.S. Supreme Court had ruled (see Update for Weeks of January 16th and 23rd). Now that the ACA has been upheld, the state intends to meet the January 1, 2013 federal deadline to make "substantial progress" on their own exchange and avert a federal fallback exchange. However, the legislature has yet to pass authorizing legislation and the Governor has not indicated if he will issue an executive order to circumvent any continual legislative opposition.

By contrast, the Governor did join with Republican lawmakers in expressing opposition to the mandated Medicaid expansion under the ACA. He indicated that would study whether the Pennsylvania could opt-out of the expansion via legislative action or executive order, now that the U.S. Supreme Court has given states the flexibility to do so (see above).

Governor Corbett is expected to sign S.B. 8, which would create a statewide health information exchange that will allow physicians, pharmacists, and other providers to share medical records electronically. The measure, which passed the legislature this week, also creates the Pennsylvania eHealth Partnership Authority to oversee the information exchange, which is separate and unrelated to the health insurance exchange.

South Dakota

Governor will wait until Presidential election to move forward on ACA

The U.S. Supreme Court decision this week upholding the constitutionality of the Affordable Care Act (ACA) will have little effect on South Dakota's decision to implement the new law.

Governor Dennis Daugaard (R) had followed the lead of most Republican governors in refusing to move forward on most implementation of the new law until the U.S. Supreme Court ruled. At the time, he pledged to apply for a federal exchange establishment grant and proceed if the law were upheld (see Update for Weeks of January 16th and 23rd).

However, Daugaard announced early this week that he will now wait to see if the entire law will be repealed by a new Republican President and Senate next year before moving forward. The delay all but assures that South Dakota will have a federally-facilitated exchange (FFE) starting in 2014.

The Governor also insists that expanding Medicaid in 2014 as required by the ACA will cost the state \$99 million from 2014-2019, even though the federal government initially assumes 100 percent of the costs and 90 percent thereafter (see above). He also disputes U.S. Census Bureau data showing that 13 percent of South Dakotans were uninsured in 2010, claiming the actual number is closer to nine percent. As a result, it is not immediately clear that he will not exercise the discretion granted this week by the Supreme Court to "opt out" of the expansion and forgo the enhanced funds offered by the ACA.

However, the Governor did implement some of the ACA's lesser provisions earlier this year when he signed H.B. 1220. These included the network adequacy standards, quality assessment and improvement requirements, utilization review and benefit determination requirements, grievance procedures for managed health care plans, and other standards that were required by the ACA. The measure would have automatically voided all of these new consumer protections had the ACA been struck down (see Update for Week of March 12th).

Tennessee

Governor reaffirms delay in exchange implementation, likely to opt-out of Medicaid expansion

Governor Bill Haslam (R) indicated this week that the state will continue its plan not to consider implementing the health insurance exchange required by the Affordable Care Act (ACA) until the a special session will be held this December.

The Governor has accepted \$2.5 million in federal exchange grants, which the Department of Finance and Administration used to create the Exchange Planning Initiative to develop exchange recommendations for the Governor and Legislature. However, the Governor and leading lawmakers had already decided that implementing any part of the ACA is politically untenable prior to this fall's elections (see Update for Week of January 2nd).

Subsequent to this week's U.S. Supreme Court decision upholding the ACA, several other conservative governors have decided to likewise delay exchange implementation until election results indicate whether Republicans will have sufficient federal control to void all or part of the new law.

Though he has yet to make a formal decision, all indications are that the Governor will likewise exercise the discretion afforded this week by the U.S. Supreme Court and "opt out" of the required Medicaid expansion in 2014 (see above). A University of Memphis study released earlier this year estimates that up to 300,000 uninsured Tennesseans would gain coverage through the expansion. However, the Governor remains adamant that expanding Medicaid will cost his state more than \$300 million, even though the federal government will initially fund the expansion at 100 percent, and 90 percent starting in 2020 and beyond.