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Health Reform Update – Week of October 29, 2012

CONGRESS

Swing state voters appear to favor President Obama though his Medicare support erodes

The latest series of polls by Quinnipiac University, CBS News, and the New York Times show that President Obama appears to maintain a very narrow lead in critical swing states going into the election next week. As a result, at least one widely-cited analysis of all available polls projects that the President has more than an 80 percent probability of winning the election (garnering over 300 electoral votes.) However, several other pollsters still project a somewhat smaller margin of victory for the Republican nominee Mitt Romney.

The President was clearly buoyed this week by positive economic news showing greater than expected job gains and consumer confidence at its highest level since early 2008, as well as rare bipartisan praise for his initial handling of the damage wrought by Hurricane Sandy. However, there remain several ominous warnings for the President that may threaten his re-election.

Chief among these are the above-referenced polls that show swing state voters favor his handling of Medicare, but also demonstrate that Romney has cut his support on that issue by nearly half in Florida, Ohio, and Virginia, three swing states that Romney essentially must win to be elected. Romney now actually fares better on the Medicare issue than does Obama among senior citizens in all three states. (The Kaiser Family Foundation monthly tracking poll confirmed this trend nationwide).

The Medicare privatization plan advanced by Romney's vice presidential nominee Paul Ryan (R-WI) and passed by House Republicans was thought to be a polarizing issue that would tilt senior citizen support towards Democrats after it sparked an initial voter backlash last year (see Update for Week of May 23, 2011). However, it has not had the expected resonance in senior-heavy states like Florida, despite recent studies by the Kaiser Family Foundation and Commonwealth Fund showing the Ryan plan would have increased premiums for 59 percent of Medicare enrollees had it been in effect in 2010 and will add 45 million to the ranks of the uninsured (see Update for Week of October 15th).

During the closing weeks of the election, it has instead become clear that the pivotal issue is likely to be Romney's opposition to the President's decision to bailout the automobile industry during the recession, which remains very popular in the critical swing states of Iowa, Ohio, and Wisconsin that are heavily populated by auto workers. Romney continues to trail in each state by only a handful of percentage points due largely to his position on the bailout.

Romney cannot win the election if the President prevails in these three states, unless he scores a major upset elsewhere. As a result, his campaign began pouring resources this week into Minnesota and Pennsylvania where polls show the President has a larger though not insurmountable lead.

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Justice department does not object to reviving legal challenge to the Affordable Care Act

The Department of Justice informed the U.S. Supreme Court this week that it does not object to reviving Liberty University's challenge to the constitutionality of the individual mandate in the Affordable Care Act (ACA).

It is not clear if the high court is willing to wade back into the controversy over the ACA requirement that everyone must buy basic health insurance they can afford. Chief Justice John Roberts resolved the challenge brought by 26 state attorneys general when he sided with four liberal justices last summer in holding that imposing a penalty for those who fail to do so was a constitutional exercise of Congress' taxation power (see Update for Week of June 25th).

However, Liberty challenged the constitutionality of the individual mandate on different grounds. Its claim that forcing the purchase of health insurance violates religious freedom guaranteed by the First Amendment was never heard, as the lower court pre-emptively dismissed the case claiming that the federal Anti-Injunction Act barred challenges to a tax that is not yet in effect.

The Supreme Court is now weighing whether to resurrect Liberty's religious freedom challenge, since its earlier decision found that the Anti-Injunction Act should not apply (see Update for Week of October 1st). If it does so, the case would have to first be heard in a federal court of appeals. The Supreme Court has not set a deadline to make a decision.

Treasury refuses to comply with House Republican document request relating to ACA subsidies

The Department of the Treasury cited "longstanding Executive Branch confidentiality interests" this week as the reason for rejecting demands from House Republicans to release documents detailing agency communications regarding premium tax credits offered under the Affordable Care Act (ACA).

The House Oversight and Government Reform Committee chaired by Rep. Darrell Issa (R-CA) specifically wants to review communications between Treasury, the Centers for Medicare and Medicaid Services (CMS) and the White House prior to issuing proposed regulations that allow the tax credits to be offered in health insurance exchanges operated by the federal government. Under the ACA, states can either create their own exchange, partner with the federal government on an exchange, or default to a federally-facilitated exchange (FFE). However, House Republicans have adopted the position, advanced by conservative think tanks, that the ACA does not authorize tax credits for low-to-middle income participants in the FFE (see Update for Week of July 9th).

The proposed regulations at issue insist that the Internal Revenue Service (IRS) within Treasury does have the authority under the ACA to issue the same tax credits offered to participants in a state-based exchange. IRS Commissioner Doug Shulman testified before Congress that this position was based on the advice of agency counsel (see Update for Week of September 10th).

In refusing to disclose these deliberations with counsel, Treasury Secretary Geithner cited its traditional position that such executive branch communications are confidential in order to encourage "free, full, and unfettered discussions and debate." He noted that they are also the subject of a federal lawsuit filed last month by Oklahoma Attorney General Scott Pruitt (R) (see Update for Week of September 17th) and thus questions about "the permissibility of Treasury's statutory interpretation should be resolved through the judicial process."

House Majority Leader Eric Cantor (R-VA) blasted that agency's failure to respond as an example of the "arbitrary abuse of regulatory power [that] will permit the IRS to spend hundreds of billions of dollars without authorization from Congress." He repeated the claim that by allowing premium tax credits in the FFE, employers in the many states that default to the FFE will now be subject to the assessment under the ACA on employers who fail to provide affordable health coverage to their employees.

Reps. Scott DesJarlais (R-TN) and Phil Roe (R-TN) introduced a joint resolution last summer (HJ Res 112) that would nullify the proposed rule allowing for federal tax credits in FFEs (see Update for Week of June 18th).

Coalition urges lawmakers to raise revenues in order to avoid $538 million in HIV/AIDS cuts

A coalition of 118 organizations involved in the care of people with HIV/AIDS specifically urged Congressional lawmakers this week to raise revenues as part of the deficit reduction package needed to avert the automatic across-the-board cuts slated to go into effect on January 2nd.

The 8.2 percent sequestration cuts were triggered after the so-called "super committee" created by the Budget Control Act of 2011 failed to reach a consensus on any measures to reduce the budget deficit by $1.2 trillion over ten years (see Update for Weeks of November 21st and 28th). In its letter to Congressional leaders, the AIDS Budget and Appropriations Coalition (ABAC) warned the $538 million to be cut from AIDS Drug Assistance Programs (ADAPs) and HIV prevention and research would "severely disrupt the system of lifesaving care" that serves over 500,000 low-income Americans with HIV/AIDS. They predicted that at least 15,708 ADAP enrollees would be deprived of access to critical drug therapies, while over 4,700 would lose housing support and 460 AIDS research grants would be eliminated.

The ABAC letter insisted that "raising revenue is an essential part of a balanced approach to deficit reduction" that must be part of any package that Congress enacts during the lame-duck session following the election.

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FEDERAL AGENCIES

Final regulations temporarily boost Medicaid reimbursement for primary care physicians

The Department of Health and Human Services (HHS) issued long-awaited final regulations this week that implement the Affordable Care Act (ACA) provision temporarily raising Medicaid payments for primary care physicians without increasing costs to states.

Under the final rule, Medicaid payments for physicians practicing in family medicine, general internal medicine, pediatric medicine, and related subspecialists will be raised to Medicare levels, but only for calendar years 2013 and 2014. However, obstetricians, gynecologists and emergency room physicians will not be eligible for these higher payments.

Raising Medicaid payment to Medicare levels will greatly boost physician reimbursement in states like Rhode Island, California, and Florida where Medicaid pays only 30-40 percent of Medicare rates.

The HHS Secretary emphasized that in addition to this payment boost, the ACA contains several other initiatives designed to improve physician participation in Medicaid and strengthen the primary care workforce. This includes an "unprecedented" expansion of the National Health Service Corps, which provides scholarships and loan repayments to primary care providers who practice in underserved areas.

Separate regulations increase Medicare payments for family physicians by seven percent and outpatient hospital services by less than two percent. The rule still sets the 26.5 percent cut in overall Medicare physician payment for January 2013; although HHS specifically notes that it expects Congress to delay the cut as it has every year since 2003.

Washington becomes second states approved for dual-eligible demonstration under the ACA

The Centers for Medicare and Medicaid Services (CMS) announced this week that Washington state has joined with Massachusetts as the first two states approved under the new demonstration project to coordinate care for the nine million low-income Americans enrolled in both Medicare and Medicaid.

This dual-eligible demonstration authorized by the Affordable Care Act (ACA) creates a "shared savings" program similar to the accountable care organizations created by the new law. Under the demonstration, physicians and providers have a financial incentive to improve the coordination of care for dual-eligibles and receive a portion of the "savings" below a set budget.

Dual eligibles often have multiple chronic conditions and complex health care needs that make them very costly to treat. Although they make up only 15 percent of Medicaid, dual eligibles account for almost 40 percent of Medicaid expenditures according to the Kaiser Commission on Medicaid and the Uninsured.

The demonstration will launch in Washington on April 1st and continue until December 31, 2016. It is expected to operate in all but three counties where the state is pursuing the managed care model allowed under the demonstration. The state can expand to those three counties at any point before November 1, 2013.

CMS has been surprised that 27 states have already sought to participate in the pilot program. However, the demonstration has been beset by controversy, as it could now wind-up enrolling over a third of all dual eligibles. The Medicare Payment Advisory Commission (MedPAC) joined a chorus of lawmakers and provider groups last summer in urging CMS to "slow down" on its planned implementation to ensure that savings from the demonstration will not be achieved simply by providers skimping on care to this hard-to-serve population (see Update for Weeks of July 23rd and 30th).

A study released this week by the Kaiser Family Foundation only heightened these concerns by concluding that efforts to better coordinate care for dual-eligibles will only produce "modest savings…. without jeopardizing the quality of patient care, through capitated managed care programs or care coordination approaches."

GAO concludes that drugmakers have not increased prices to counter ACA mandated discounts

A report released late last week by the Government Accountability Office (GAO) concludes that the Medicare Part D Discount Program created by the Affordable Care Act (ACA) did not impact the prices for 77 high-expenditure brand-name drugs.

According to the study, prices for the 77 drugs surveyed increased at a similar rate before and after the ACA mandated a 50 percent discount in 2011 on brand-name drugs furnished in the Part D coverage gap or "doughnut hole" . The findings refute claims by ACA opponents that the discount program would cause drug manufacturers to simply charge higher prices to Part D enrollees who do not enter the gap.

GAO notes that the prices for the 77 high-cost drugs rose by 36 percent for enrollees in the "doughnut hole" from January 2007 – December 2010, as compared to 35 percent for those not in the gap. However, from December 2010-December 2011, prices for both groups increased by 13 percent.

The GAO report comes after the Centers for Medicare and Medicaid Services announced last week that Part D enrollees have saved $4.8 billion on prescription drug costs since the ACA went into effect (see Update for Week of October 22nd).

STATES

Most legislative seats up for grabs, outcome may dictate ACA implementation

According to the National Conference of State Legislatures (NCSL), the composition of state legislatures may change dramatically next week as more than 6,000 of the roughly 7,400 seats in 44 states will be up for grabs in the November 6th election.

The results of both the legislative and gubernatorial elections will have an immediate and potentially severe impact on implementation of the Affordable Care Act (ACA). After a very successful election cycle in 2010 in which Republicans took more than 20 legislative chambers from Democrats, Republicans currently control 26 state legislatures and 29 governorships. They also hold majorities in 60 of the 99 legislative chambers nationwide.

Republican leaders in the vast majority of these states have either adamantly opposed implementing any provision of "Obamacare", or are taking a "wait and see" approach to gauge whether the elections will give Republicans sufficient federal control to repeal all or part of the new health insurance reform law. Opposition to ACA implementation may also increase if Republican lawmakers are able to further consolidate their power at the state level, even if Democrats can retain control of the White House and United States Senate (see above).

The Democratic Legislative Campaign Committee insists that Democrats are favorites to win back both Houses in Maine (see below) and Minnesota, where Republican control has blocked most implementation of a state-based health insurance exchange. It also expects Democrats to control the legislatures in Colorado and Oregon by winning back House chambers, as well as New York where Republicans hold a narrow Senate majority and successfully forced Governor Andrew Cuomo (D) to try and implement the exchange via executive order instead of authorizing legislation (see Update for Week of April 9th).

Democrats are also only two seats short of a supermajority in the California Senate, which could enable Governor Jerry Brown (D) to enact his proposed tax increase without Republican opposition. They also believe they can end Republican supermajorities in both Arizona and New Hampshire (which have also prevented most ACA implementation).

However, in states like Florida, Georgia, Indiana, North Carolina, Tennessee, and Texas, the elections will dictate whether Republicans can retain or gain a supermajority. The Republican supermajority in Florida has blocked nearly all ACA implementation since the law was enacted.

Republicans appear poised to return control of the Wisconsin legislature, after Democrats briefly assumed control of the Senate following recall elections earlier this year (see Update for Weeks of May 28th and June 4th). Wisconsin Governor Scott Walker (R) has been an ardent opponent of the ACA and undone most of the implementation efforts of his predecessor.

Republicans also expect to gain control of every state legislature in the south by winning both chambers in Arkansas, the last Democratic stalwart. In addition, Republicans have a good chance of seizing the Alaska Senate (currently tied), Iowa Senate, New Mexico House, and Washington Senate.

Five states have placed voter referendums on their ballots next week that relate to the ACA. However, only the Missouri measure is likely to have a practical impact, as it seeks to prevent the Governor from implementing a health insurance exchange via executive order (see Update for Week of May 21st). The other referendums in Alabama, Florida, Montana, and Wyoming all seek to nullify the ACA mandate that individuals purchase basic health insurance they can afford. However, this measure (which already passed in Arizona, Missouri, and Oklahoma but was rejected in Colorado) is purely symbolic after the U.S. Supreme Court upheld the constitutionality of the individual mandate, which supersedes any conflicting state laws (see Update for Week of June 25th).

California

Blue Shield complies with capped profit pledge by returning $50 million to subscribers

Blue Shield of California announced this week that it will return $50 million to policyholders by the end of the year as part of its pledge to cap annual profit at two percent of revenue.

The health insurance giant made the pledge last year in the midst of the firestorm created by its aborted effort to hike premiums by up to 86 percent for some individual plans (see Update for Week of June 6, 2011). California insurance commissioner David Jones (D) had found that Blue Shield's rate filings greatly understated the actual decrease (see Update for Week of March 14, 2011) and used the "excessive" rate hike as further justification in his unsuccessful campaign to pass expanded rate review legislation (see Update for Week of August 29, 2011).

As part of that pledge, Blue Shield already refunded $470 million in excess income from 2010 and 2011 to consumers and providers. It has promised to continue to rebate any profits over two percent of its revenues, so long as it can remain "solvent" and "competitive".

The $50 million in rebates this year will take the form of premium credits on billing statements issued to policyholders. Individual subscribers will see about a $25 credit for single coverage and $75 for family coverage, while small and large group subscribers will receive $35-40.

Plans rush to participate in new Covered California health benefit exchange

The newly named Covered California health benefit exchange announced this week that 33 health plans are seeking to participate in the online marketplace being created pursuant to the Affordable Care Act (ACA).

The exchange board solicited bids last month and intends to select participating plans by March 30th (see Update for Week of October 1st). California was the first state to enact legislation authorizing a state-based exchange and is on schedule to start open enrollment next October as required by the ACA.

The exchange board is creating an "active purchaser" model already in place in Massachusetts and also being created in states like Connecticut, Hawaii, and Maryland as well as the District of Columbia. Under this model, the board can negotiate rates with plans and exclude those it deems unaffordable. This differs from the "clearinghouse" model in place in Utah where any plan that meets minimum standards can participate.

The state's four largest insurers in the individual market -- Anthem Blue Cross, Blue Shield of California, Health Net and Kaiser Permanente -- have all submitted bids despite the selection of the "active purchaser model." The Board will select the best 5-6 plans for a given region, so that those offered in Los Angeles may differ greatly from those offered in San Diego. Smaller insurers and large hospital systems also might be selected to offer health plans in certain areas through the exchange.

The board anticipates that 4.4 million Californians will use the exchange by the end of 2016, which is intended to curb runaway premium hikes in the state through increased competition. The average premium for employer coverage in California has increased 154 percent over the last decade, more than five times the 29 percent increase in the state's overall inflation rate.

Idaho

Governor's working group votes in favor of state-based health insurance exchange

The health insurance exchange working group created by Governor Butch Otter (R) has voted overwhelmingly in favor of a state-based health insurance exchange to be operated by a private, non-profit organization.

The Governor must now decide whether to approve or reject the panel's recommendation. If he does not notify the federal government by November 16th of his intent to create a state-based exchange that complies with the Affordable Care Act (ACA), Idaho will default to a federally-facilitated exchange (FFE) starting in 2014.

However, Governor Otter has been one of the few Republican governors calling for a state exchange in favor of ceding control to a FFE and has even threatened at times to create the state exchange via executive order if Republican lawmakers do not pass authorizing legislation (see Update for Week of July 9th). Republicans have largely remained opposed to implementing any part of "Obamacare". Rep. Lynn Luker (R), one of only two panel members to vote against the exchange, compared the ACA mandate for an exchange to "an abuser [and] a spouse." However, others have recently sought a more pragmatic approach to both the exchange and the Medicaid expansion following the U.S. Supreme Court decision to uphold the law (see Update for Week of September 10th).

The pragmatic approach was favored by most panel members, with restaurant owner Kevin Settles urging them to "get past arguing the legality of the law [and] make something good out of this." Rep. John Rusche (D) insisted that a FFE would impose far higher premiums than a state-based exchange while others simply were adamant that Idaho should retain as much control as possible over ACA implementation.

State consultants indicated last month that Idaho had run out of time to meet the federal deadline to make substantial exchange progress or default to the FFE. However, other consultants like Leavitt Partners (headed by a former Centers for Medicare and Medicaid Services Administrator) insisted that Idaho could still use its $30 million in federal exchange establishment grants to meet the deadline if it acted aggressively.

Governor Otter is awaiting the recommendations of a second working group regarding whether to participate in the Medicaid expansion under the ACA (see Update for Week of July 16th). However, unlike the exchange, the Governor has indicated that he is leaning towards opting-out of the expansion despite favorable cost estimates (see Update for Week of September 10th). He will ultimately need legislative approval to fully implement either the state-based exchange or Medicaid expansion.

Maine

Maine likely to default to federally-facilitated health insurance exchange

The office of Governor Paul LePage (R) conceded this week that Maine may default to a federally-facilitated exchange (FFE) in 2014, as it likely cannot meet the January 2013 federal deadline to make "substantial progress" on a state-based exchange.

Federal regulations implemented pursuant to the Affordable Care Act (ACA) required states to notify the Obama Administration by November 16th if they will meet this deadline. Governor LePage has officially adopted a "wait and see" approach before making a decision, in an effort to judge whether the elections next week will give Republicans sufficient federal control to repeal all or part of the new law. He had insisted that Maine could still meet the deadline after the election, but his office acknowledged that without any authorizing legislation or initial design for the online marketplace, the state will have to at least initially default to an FFE.

Governor LePage has ruled out seeking the federal-state partnership allowed by federal regulations, even though six other states in a similar situation are seeking federal approval to do so (see Update for Week of October 22nd). He also returned the $5.8 million federal exchange establishment grant earlier this year.

The Governor had initially supported the creation of an ACA-compliant state exchange and created an advisory committee to recommend designs (see Update for Week of October 31, 2011). However, opposition by tea party backed Republican lawmakers to any "Obamacare" implementation blocked passage of all but a "bare bones" exchange bill that does not comply with the ACA (see Update for Week of April 16th).

According to the Kaiser Family Foundation, seven states have formally told the Obama Administration that they will default to an FFE (Alaska, Florida, Louisiana, New Hampshire, South Carolina, South Dakota, and Texas), while at least eight others have not shown any activity towards creating a state exchange and are thus likely to do so.

Governor accuses CMS of "political games" after review of Medicaid cuts extended past election

Governor Paul LePage (R) accused the Obama Administration of playing "political games" this week, after the Centers for Medicare and Medicaid Services (CMS) extended its review of his proposed Medicaid eligibility cuts for another 90 days.

CMS has previously refused to grant the expedited review of the Governor's cuts so that he could put them in place on October 1st as set forth in state legislation (see Update for Weeks of August 27th and September 4th). The Governor expects to save over $20 million by eliminating Medicaid coverage for roughly 33,000 enrollees, including all enrollees age 19-20.

CMS is expected to reject the Governor's effort to enact these cuts, as it was steadfastly refused to grant any state a waiver from the Affordable Care Act (ACA) provision prohibiting Medicaid eligibility cuts below 133 percent of the federal poverty level until 2014. Governor LePage insists that the recent U.S. Supreme Court decision gives states discretion to opt-out of this prohibition, even though the Congressional Research Service concludes it does not (see Update for Week of July 9th).

In an effort to circumvent this "maintenance of effort" provision of the ACA, the Governor unsuccessfully sought the intervention of the First Circuit U.S. Court of Appeals (see Update for Weeks of August 27th and September 4th). He also tried to implement the cuts through an amendment to the State Medicaid Plan instead of a waiver.

Medicaid regulations require CMS to rule on State Plan Amendments within 90 days, which was set to expire on November 1st. However, the agency frequently extends this deadline, as it did this week.

Governor LePage immediately insisted that CMS extended the deadline past the election to avoid controversy. Democrats may also gain control of one or both state legislative chambers (see article above), thereby eroding the Governor's support for the cuts. He claimed that the delay is costing the state $2.2 million per month.

New Jersey

New bill would exempt students from having to maintain basic health insurance coverage

Senator Ronald Rice (D) introduced legislation last week that would eliminate the current requirement that every student enrolled full-time at a public or private institution of higher education in New Jersey must maintain health insurance coverage which provides basic hospital benefits. S.2291 also eliminates the requirement that every full-time student annually present evidence of health insurance coverage, however all institutions of higher education must still offer health insurance coverage to full-time students.

The bill specifically states that any requirements for health insurance coverage imposed by the Affordable Care Act (PPACA) will still apply. Most full-time students would not earn enough to be subject to the ACA mandate to purchase basic health insurance that they can afford.

Pennsylvania

Legislature sends bill to Governor that would increase access to community pharmacy services

The legislature sent S.B. 201 to Governor Tom Corbett (R) last week. The measure, which was introduced last year by Senator John Rafferty (R), would prohibit private or public health plans from imposing copayments, deductibles, benefit limits or any other restriction on retail pharmacy customers that are not likewise required of mail order pharmacy customers. However, the prohibition will only apply if the retail pharmacy accepts the same pricing, terms, conditions or requirements related to the cost and quality of the prescriptions that the insurer has established for the mail order pharmacy or its affiliates (including a pharmacy benefit manager.)

The bill also requires a study to be conducted by the Legislative Budget and Finance Committee within 18 months. The study will evaluate the impact the measure on prescription drug access at both independent and chain retail pharmacies, as well as upon drug costs for consumers and health plans.